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ABSTRACT

This teachers' guide focuses on each of the of the first 10 amendments to the U.S. Constitution and the Equal Protection Clause of the Fourteenth Amendment. Organized by amendment, each section includes the text of the amendment and its counterpart in the Maine Constitution; an introduction to the legal principles embodied in that amendment; and edited court cases interpreting the amendment. The curriculum may be used as a whole to provide in-depth study of the Bill of Rights or specific amendments of particular interest may be selected. The curriculum is designed to be incorporated in existing history, government, civics, law, and social studies courses. The lessons provide information about landmark court decisions and information about specific constitutional issues. The back of the guide contains a 7-item annotated bibliography. (TSV)

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ED 412 163

BILL OF RIGHTS

Cases and Controversies

Teachers Guide

Grades 8–12

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Maine Law Related Education Program

University of Maine School of Law

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THE BILL OF RIGHTS: CASES AND CONTROVERSIES

Introduction

The Bill of Rights, the first ten amendments to the United States Constitution, celebrated its two hundredth anniversary in 1991. The Bill of Rights continues to play a vital role in our daily lives as citizens, because it protects so many of the individual, fundamental rights we take for granted and exercise regularly. The great importance of the Bill of Rights in modern American life justifies great emphasis on this document in the curriculum of schools. To this end the Maine Law-Related Education Program of the University of Maine School of Law has prepared a Bill of Rights curriculum which focuses on cases and controversies about individual rights decided by the United States Supreme Court, the Maine Supreme Judicial Court, and federal courts which serve Maine.

The substantive content of this curriculum is organized by each of the ten amendments and the Equal Protection Clause of the Fourteenth Amendment. Each section includes the text of the amendment to the United States Constitution and its counterpart in the Maine Constitution; an introduction to the legal principles embodied in that amendment; and edited cases interpreting the amendment, each preceeded by its own brief introduction.

A separate teacher guide sets out law-related education teaching strategies and provides specific applications of these strategies to selected cases and issues in the materials. References to teaching resources which complement the Bill of Rights cases presented here are also included.

The Bill of Rights curriculum can be used as a whole to provide an in-depth study of the Bill of Rights, or specific amendments of particular interest to your students can be selected. The curriculum is intended to be incorporated into existing history, government, civics, law and social studies courses at the high school and upper middle school level. The materials can be reproduced for use in the classroom as needed.

As you use these curriculum materials and try out suggested teaching strategies in your classroom, we would be interested in your experiences, comments, opinions and suggestions. If you used approaches that worked successfully or identified particularly effective lesson plans, we would like to know about them to share them with other teachers. Please send us your comments and lesson plans to:

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Overview: Federalism

By its choice of Maine and federal cases, this curriculum looks at issues of relative power between the states and federal government and at how governmental power at all levels is limited to protect the individual rights of citizens. Many people think of the United States Constitution as **the** Constitution. In fact, it is one of 51 constitutions in this country, because each state has a constitution of its own spelling out how that state's government is to operate and what citizens can expect from it. Federal and state constitutions are not identical, nor are they entirely independent. They exist in relation to each other, raising questions which are at the heart of our federal system: the relationship of federal power to state power, and of federal limitations on governmental power to state limitations on governmental power.

These questions of relative power dominated debate in the Constitutional Convention and have occupied our lawmakers and courts ever since. Nowhere are they more important than in the protection of individual rights. Prior to the adoption of the federal constitution, constitutions then in force in several of the states provided explicit protections for individual rights, limiting the authority of state governments to infringe on them. The Founders, fresh from the failed attempt at unity under the Articles of Confederation, wanted the new Constitution to provide strength in union, but not at the expense of the powers of the states nor of the individual rights of the citizens of the states.

Safeguards were written into the original Constitution to prevent the new federal government from becoming an overpowering force. Some of the Founders argued that the Constitution as written both preserved state authority and protected individual rights. Others insisted that the Constitution, while striking the right balance between state and federal power, did not sufficiently protect individual rights against federal power. The latter arguments proved persuasive during the ratification process. Ratification turned on the promise that a Bill of Rights, containing explicit limitations on the federal government's power to infringe upon individual rights, would immediately be added to the Constitution. And so, in 1791, it was.

By 1865 the threat to individual rights was viewed as coming from the states, in the form of the Southern states' refusal to protect the freedom and rights of former slaves. The states' demonstrated ability to infringe upon federally guaranteed rights impelled the adoption of the Thirteenth, Fourteenth, and Fifteenth amendments. The Fourteenth Amendment was enacted to make clear that the states could not limit or take away rights which individuals were guaranteed as U.S. citizens. A great deal of judicial thought and writing since adoption of the Fourteenth Amendment has been devoted to working out the implications of this amendment in our federal-state system.

The Fourteenth Amendment does not simply impose the same limitations on state governments which the Bill of Rights imposes on the federal government. Rather, the United States Supreme Court has identified some rights as fundamental, and held that states must protect these fundamental rights to the same degree as the Bill of Rights protects them. States have greater discretion in deciding how they will deal with other rights, considered mere "liberty interests." For example, all states must protect religious choices as a fundamental right, but states do not have to start all criminal prosecutions with a grand jury or provide juries for all civil trials. States may also provide greater protection or guarantee additional rights to their citizens. For example, the constitutions of several states guarantee the right to a free public education. The Maine Constitution, by its words, gives broader protection to the right to bear arms than does the federal Constitution.

Just as there are federal and state constitutions, there are federal and state court systems. The courts in both systems have the same fundamental task: to interpret and apply the law in cases which come before them. In general, state courts have the final say on questions involving the state constitution and state laws, and the federal courts have the final say on questions involving the federal constitution and federal laws. However, many cases involve questions of both state and federal law. In these cases the relationships between state and federal court systems and the laws they interpret and apply become critical.

The United States Supreme Court is the court of last resort on questions involving the federal constitution and federal law. The Supreme Court is asked to hear about 5,000 cases a year, a small portion of the cases which could be appealed to the Court from lower federal courts and state courts. Of these, the Court actually hears and decides only about 150 cases a year. State courts, in fact, decide the vast majority of all cases, including cases involving individual rights. State courts are constantly interpreting the state and federal constitutions in their rulings and decisions. That is why we have included Maine court decisions on the Bill of Rights and its Maine constitutional counterparts in these materials.

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TEACHERS GUIDE

Introduction to Law Related Education Teaching Strategies

Law is a rich source of content and method for education at all levels. As content it deals with the fundamental principles, processes and values essential to preserving and strengthening our democratic society. Is the purpose of law to ensure order or to promote justice? How are the concepts of authority, responsibility, fairness; free speech, privacy, and due process embodied in the law and specifically in the cases decided by state and federal courts? How are laws made? How does the law protect invididual rights and expect individual responsibility? These are some of the questions posed by law as content.

The methods of law require students to reason through hard questions as they confront actual social problems. Law-related education teaches students how controversial issues are managed in a democratic society. Whether formally through the court system and legislative process or informally in school life, managing controversy requires knowledge, sensitivity to personal and social values, and critical thinking skills. Law as method develops skills of analysis, reasoning, persuasion, and decision-making based on evidence. These skills are essential to civic competence and responsibility in our society.

Strategies for teaching and learning law-related content reflect the methods of law. They reinforce the importance of supporting conclusions, beliefs and decisions with reasons; of understanding others' positions; and of considering the consequences of action. Law-related education strategies are highly interactive. Teacher and student are involved actively in a common endeavor. The strategies involve students in case analysis, mock trials and moot court simulations, small group cooperative learning, role-plays, and other active instructional techniques. Students practice how to become skilled adult citizens through active participation in law-related education.

What you will find here are ideas for teaching law as content and method, with guidelines and sample lessons to stimulate your own creative approaches. These methods have been used effectively in many classrooms throughout Maine. In fact, law-related educations programs implemented throughout the country since the 1970's have successfully used these techniques with students at all grade levels, elementary through adult. Students respond strongly and positively to law-related materials and methods.

Law Related Education Strategies for the Bill of Rights

We have focused on teaching strategies for the Bill of Rights, since that is the legal content in this set of curriculum materials. These strategies, however, can be used with other law-related material and we encourage you to do so.

The following list of teaching strategies is a starting place for designing law-related lesson plans. The strategies have been organized under three separate headings: those using the Bill of Rights and cases interpreting them as text; those involving role-playing; and those involving non-text resources. Selected strategies from the list are set out in more detail in the next section.

Strategies Using the Text of the Bill of Rights and Cases

1. Interpretation: what do the words in the Bill of Rights, such as "speech," really mean?
2. Rank the rights. Have students decide which are the most important rights, either within a given amendment or overall, and explain why.
3. Issue search: find every reference to a given issue in either the Bill of Rights or the assigned case.
4. Case study analysis: find the facts, issues, lower court decision(s), appeals court's decision, reasons, dissent (if any).
5. Compare the majority and dissenting opinions.
6. Evolution of law. How has the Court's view of an issue such as civil rights changed over time?
7. Federalism. Where and how does the Maine Supreme Judicial Court differ from the United States Supreme Court? Or does it?

Strategies Involving Role-Playing

1. Adversary debate.
2. Mock trial.
3. Appellate (moot court) argument.
4. Legislative debate and/or legislative committee hearings.
5. Town meetings.
6. State/local hearings, for example Planning Board, Board of Environmental Protection.
7. Constitutional Convention and/or state ratifying convention debate on need for Bill of Rights.

Other Strategies

1. Outside speakers/community resource persons such as lawyers, judges, police.
2. In-school resource persons.
3. Analysis of "hypotheticals," or made-up facts posing a legal issue.
4. School policy issues.
5. Student-generated policy issues.
6. Legislative drafting or rewriting unconstitutional laws or rules.
7. Study starter: using videos, films, literature to introduce constitutional issues.
8. Journals.
9. Polar meter, or continuum. Have students line up according to their positions on an issue, explain their positions, and try to convince each other to change, or move on the continuum.
10. NIMBY (Not in My Backyard). Discuss common needs against individual dislikes, using examples like low-level nuclear waste dump sites, neighborhood AIDS clinics or homeless shelter, large scale development in residential neighborhoods.
11. Political cartooning.
12. "You Are the Judge." Present the facts of a case, and have students write opinions before studying the actual opinion.
13. Panel discussion of controversial issue.
14. "A Day Without the Bill of Rights."
15. Brainstorming. Apply this problem-solving tool to legal problems.

Using Cases and Controversies

The study of key court cases is an essential element in the development of an understanding of the Bill of Rights. Students, in order to understand the significance of these key cases, must do far more than simply memorize the names of the cases. Basically, students must understand the specific facts and holdings of the case, be aware of its broader implications, and be able to apply to legal principles to related situations. The case study method can involve a number of approaches, all designed to provide students with the opportunity to determine the facts, identify the issues, outline the arguments, and understand (though not necessarily agree with) the decision in the case.

I. Case Analysis

Purpose: The case analysis method is an inquiry-oriented technique. It is designed to help students apply legal theory to real-life situations, such as actual court cases, hypothetical situations involving some conflict or dilemma, and situations drawn from newspapers, magazines, books, or videos. The cases in this curriculum provide many opportunities for case analysis.

Procedures

1. Select the case and present it to the students, by handing out an edited case from these materials or from another source. All or parts of the case may be handed out initially; for example, the court's decision may be withheld until later in the discussion.

2. Have the students review the facts of the case. The facts serve as the basis for classroom discussion. The inquiry process should be started by carefully reviewing and clarifying all of the facts. Students can be asked:

    - What happened in this case?
    - Who are the parties?
    - What facts are important? Unimportant?
    - Is any significant information missing?
    - Why did the people involved act the way they did?
    - How did the lower courts rule on this case (if the case is on appellate review)?

3. Help the students frame the issue or issues in the case. The legal issue is the question of law on which the resolution of the case turns. An issue should be posed in the form of a question. For example, in Tinker v. Des Moines, the legal issue might be framed: " Did the Board of Education violate the First Amendment free speech rights of the students when it suspended them from school for wearing black armbands?"

    The following questions are a tool for students to identify the issue, when it is a constitutional case involving state action:

    - Who was the actor? (Board of Education)
    - Who was the recipient of the action? (students, the Tinkers)
    - What is the action that caused the controversy? (suspension from school for wearing armbands)
    - What is the specific part of the Constitution or statute involved? (First Amendment free speech clause)

4. Discuss the **arguments** on both sides of the controversy. When discussing the arguments students should consider such questions as:

   - What are the arguments in favor of and against each point of view?
   - Which arguments are most persuasive? Least persuasive? Why?
   - What might be the consequences of each course of action? To the parties? To society?
   - Are there any alternatives?

   In discussing the various arguments it is important to foster a climate of acceptance and openness. Students should be encouraged to listen to, consider, and evaluate all points of view.

5. Ask students to reach a **decision**, or answer to the issue posed by the case. Try to reach a class concensus after careful consideration of the facts, issue, and arguments. There may be a minority view. Students should be asked for the reasons behind their decision. Then compare the class decision to the actual decision of the court.

   When students are given the court's decision, they should be asked to evaluate it. Do they agree or disagree? What will the decision mean for the parties? For society?

6. **Variations on a theme**: When conducting a case analysis you may wish to try one of these variations:

   - Giving students unmarked opinions. Using this approach students are not told which of the court opinions is the actual holding of the court. Rather they are asked to select the opinion they agree with and explain why. Later they can be given the majority decision of the court and asked to compare their reasoning and result against that of the court. This approach is appropriate when the court has split with majority and dissenting opinions, particularly if it is a 5-4 decision of the U.S. Supreme Court.

   - Giving students only the facts. Using this approach students are asked to identify and formulate the issues, prepare arguments on each side, develop a decision, and then evaluate their issues, arguments, and decision against the actual holding of the court.

   - Student law firms. Students are divided into small groups to form law firms to argue a case. The students each receive only the facts and issues in the case. Each student law firm is assigned to represent one of the parties and develop arguments to support that position. The law firms can present their arguments orally or in writing. This can become a simulation with a panel of judges hearing the arguments and deciding the case, or the class can be asked to evaluate the arguments and predict how the court ruled. The arguments can then be evaluated against the decision and reasoning of the court.

   - Writing opinions. Students can be given the facts, issues, and arguments in a case and assigned individually or in small groups to write their decision. The opinions can be read aloud in class and compared to the actual decision of the court, both majority and dissenting opinions if relevant. This could be used as an evaluation activity after a case analysis has been done by the whole class.

II. Adversary Debate

Purpose: To allow students an opportunity to combine their ability to analyze a legal case with skill in oral advocacy.

Procedure:

1. Divide the class into teams for the debate. Two or three students per team is optimal. Distribute the same case to each team.

2. Establish the legal issue in the case with the whole class. Then assign each team to represent the position of either the petitioner or the respondent (affirmative or negative). For example, the issue might be whether schools have the right to censor school newspapers (Hazelwood v. Kuhlmeier). The advantage of assigning team positions is that it confronts students with having to defend points with which they may not agree.

3. Have students, working in their teams, research the issue using other relevant cases as precedent and prepare their arguments in favor of their position, attacking the position of the other side. If possible, have each student argue a point during the debate.

4. Using the rules for debate, appoint a chairperson and a timekeeper. Make sure both sides are aware to the amount of time for direct and rebuttal argument. A faculty member or outside resource person with formal debate experience would be a great help to this exercise, particularly in establishing the debate rules and procedure.

5. Station the chairperson and timekeeper at the front of the room, with the opposing sides to their right and left, facing each other. The chairperson introduces the case, frames the legal issue for debate, and calls on the first speaker arguing the affirmative position.

6. The speaker presents his or her argument, with the timekeeper noting when the time limit is reached. He or she is followed by the first speaker in opposition, and then by the other speakers, alternating from each side. Students should be alerted to be flexible enough to counter points raised by the other side, even if not previously prepared on that point.

7. After all speakers have presented their direct arguments, rebuttal argument follows, beginning with the team in opposition. Here one or more speakers, working without a set speech, attempt to weaken the arguments put forth by the other side, and answer attacks made in the direct argument. New issues are not permitted to be made during rebuttal.

8. After the teams conclude, the remainder of the class should score the teams, and the entire class should discuss the results. Students may be asked which arguments they found to be most effective. The discussion should include consideration of the decision made by the court in the actual case.

III. Appellate (Moot Court) Argument

Purpose: To assist students in understanding the procedures used before courts of appeal and to practice writing legal briefs and presenting oral arguments.

Procedure:

1. Select a case and assign students roles as attorneys for both sides and as justices of the appellate court. The students should have access to the facts and issues in the case and the decision of the trial court. They should not read the appellate opinion in full ahead of time, as it will be more effective if neither side knows what the court's actual decision was.

2. Instruct students on procedures used in appeals courts. The losing side at trial has the right to appeal, and to try and persuade a panel of appellate judges that the original trial was unfair or the result legally wrong for one reason or another. There are no witnesses or jurors at an appellate argument, and the facts are not in issue. Present are the judges, seven on the Maine Supreme Judicial Court and nine on the U.S. Supreme Court, and the lawyers who attempt to persuade them by means of legal arguments. The moot court should have an odd number of judges, as cases are decided by majority vote. One justice should be appointed as Chief Justice, who calls on the attorneys to make their presentations, notifies them when their time is up, and votes last in deciding the case.

3. If possible, arrange for a field trip to hear arguments before the Maine Supreme Judicial Court. This will give students the opportunity to see and hear an appeals court in action.

4. Lawyers prepare both written arguments, called legal briefs, and oral arguments in an appeal. Students can be assigned to do both, or just to prepare for oral argument in the case. Students should prepare, at the minimum, a list of major issues in the case and their arguments supporting their position on each issue. Allow students approximately two weeks to prepare their written arguments.

5. Enact the arguments before the moot court justices. The justices sit in a row (the "bench") at one end of the classroom. Black robes, or formal dress, will help set the mood. Each attorney, when called, stands, faces the bench, and presents his or her argument, beginning with the words: "May it please the Court." The justices may interrupt at any time to ask questions. Students playing justices should prepare some questions in advance. Time must be strictly rationed so that all attorneys have a chance to be heard. Time can be reserved by each side for a short rebuttal argument.

6. After the arguments are completed, the justices "retire" to consider the arguments and reach a decision. The decision is announced by the Chief Justice. The justices can also be assigned to write an opinion giving the reasons for their decision.

7. Debrief the class, discussing the arguments and the decision. At this point students will have a great deal of knowledge of and interest in the case, so they will benefit from reading the actual opinion and any dissent.

IV. Hypothetical Analysis

Purpose: This activity is designed to evaluate a student's understanding of the basic concepts concerning the Bill of Rights.

Procedure:

1. Upon completion of study on a basic civil liberty guaranteed by the Bill of Rights (such as the right to be free from "cruel and unusual punishment" guaranteed by the Eighth Amendment), the teacher provides the students with several hypothetical examples concerning this concept. Each hypothetical should have a slightly different situation and fact pattern. If possible, base the hypotheticals on actual cases decided in the courts. Alternatively, develop hypotheticals from real life situations described in the newspaper, magazines, TV news, etc. For example, does it violate the Eighth Amendment for a 17 year old minor to be given the death penalty if convicted of murder? What if the minor is 16? 15?

2. Ask students to decide if the hypothetical situation is:

   - protected under the Constitution;
   - protected as the result of judicicial rulings or precedent;
   - not protected under the Constitution.

   Students should compare the elements in each case that dictate in which of the three categories it falls. Students can work individually, in small groups, or as a whole class to discuss and decide the hypotheticals.

V. Controversial Issue Continuum

Purpose: To consider the polar positions of a controversial issue underlying a Bill of Rights case, and to examine alternative positions and their consequences on society as a whole and on individuals.

Procedure:

1. Select an issue that has legitimate opposing viewpoints, such as whether flagburning should receive Constitutional protection as free speech or be prohibited by Constitutional amendment. Students are presented with a continuum of possible attitudes or approaches on this controversial issue, and are asked to determine which element of the continuum most approximates their own attitude.

2. Describe the issue in enough detail so that the polar positions are clearly understood. These should be written on the board. The facts of an actual controversy can be used, or hypothetical examples based on interpretations of the Bill of Rights studied previously.

3. Ask students to write their position on the issue individually, and list the two most compelling reasons why they believe as they do.

4. While the students are writing their statements, draw a continuum line across the chalkboard. When the students are finished writing, print along the continuum line brief versions of some possible positions on the issue. Ask a limited number of students to stand at the position on the continuum where they believe their position on the issue falls. The rest of the class can observe and ask questions to clarify positions. Alternatively, to involve the whole class ask the remaining students to position themselves along the continuum after the initial positions have been stated.

5. Ask several students to explain or clarify, but not to defend or give reasons for their positions. All students should be encouraged to move their positions along the continuum as they listen to others clarify their positions.

6. Now ask students to state their reasons for positioning themselves as they have. Or, you may wish to pose these. Students can respond to questions concerning their reasons, but argumentation should not be allowed.

7. In order to assure that students listen to and consider opposing points of view, students should be asked to present the arguments that, although contrary to their positions, give them pause, make them think twice, get under their skin, or are the most persuasive.

8. Try changing the facts of the situation presented to clarify students' underlying values around the controversial issue. Several hypotheticals can be used to see if students will move along the continuum as significant facts change.

9. Finally, ask the students to consider the consequences of altenative policy choices. This involves identifying the existing law or policy on the issue being considered, if it exists. The class can then discuss what impact the polar positions presented on the continuum would have on society as a whole and on individuals.

VI. Constitutional Issue Search

Purpose: To familiarize students with the correlation of legal issues to our Constitution and the Bill of Rights.

Procedure:

1. Provide students with a copy of the United States Constitution and Amendments.

2. Distribute the basic facts from several actual or hypothetical cases.

3. Assign students to groups and give the groups the task of identifying the main issue in each case, and the section or sections of the Constitution or Amendments that correspond to the issue identified.

4. The cases could encompass more than one issue for consideration, for example, due process under the Fourteenth Amendment and right to counsel under the Sixth Amendment.

5. Alternatively, students could be given one or more issues and be asked to develop a fact scenario which would provide a legal controversy for judicial consideration. They should also identify the section of the Constitution or Amendment which is involved.

VII. Mock Trials

Mock trials are a form of role play that simulate an actual courtroom trial. Conducting a mock trial in the classroom gives students the opportunity to experience the trial process rather than simply talk about it in the abstract. Mock trials are fun, and they help develop a respect for the courts through an understanding of the format and rules of courtrooms. If possible, arrange for a field trip to a Maine district or superior court so that students can observe a trial before conducting their own mock trial. Alternatively, arrange for a viewing of a courtroom movie such as "Twelve Angry Men" or "A Place in the Sun" or a video of one of the recent courtroom dramas.

Procedure:

1. Acquaint students with court procedures, either criminal procedure or civil procedure depending on the case you have picked for simulation. Provide at least two weeks to do the orientation, assign attorney teams, and select and prepare witnesses. The students should also review the simplified rules of evidence and gain an understanding of how they operate. The function of objections during the trial should be discussed and even practiced.

2. Arrange for a jury of students from other classes. The jury should have no prior knowledge of the case at all. Select a judge or judges to preside over the trial. This is an opportunity to invite a real judge to come into the classroom and preside. Students can also play the judge's role. Sample instructions from the judge to the jury are included.

3. Most mock trials can be completed within one class period, excluding jury questioning and deliberation. Those activities tend to add about one additional period to the exercise.

4. Distribute to students a "script" for the mock trial, containing the facts of the case, parties, brief witness statements, rules of evidence, the trial procedure, and general instructions. Trial scripts that contain actual testimony by witnesses are far less effective, because students merely memorize lines. Students playing witnesses, including the plaintiff and defendant, can write autobiographies, including the incident forming the basis for the trial. This will help them to personalize the case.

5. Lawyer teams for each side should prepare their own witnesses for direct and cross-examination. If they want to interview witnesses for the other side, the attorney representing that side should be present at the interview. Each witness should be thoroughly familiar with his or her version of the facts of the case, and have a chance to practice answering questions the attorney for his or her side may ask.

6. Conduct the mock trial. The classroom should be set up as a courtroom, with the judge sitting at the front of the room and the jury sitting in one or two rows to one side. Witnesses testify on the other side of the judge, facing the jury. A witness chair can be set up or the witness can testify standing. The lawyers sit facing the judge, separated from each other on either side of the room. Their clients sit with them. Witnesses sit in the back until called by the attorney on behalf of whose client they will testify. Each witness is sworn by the court officer before testifying.

7. After the trial, the judge instructs the jury and the jury retires to consider its verdict. The verdict is announced by the foreperson. Following the verdict, debrief the jurors on how and why they reached their decision.

Mock Trial Packet

Student handouts include: The Trial Process, Simplified Rules of Evidence, Judge's Instructions to the Jury - Civil and Criminal. Sample scripts for two mock trials with Bill of Rights issues are included: Texas v. Johnson (criminal) and Tinker v. Des Moines (civil).

Mock Trial Packet

The Trial Process

The Purpose

According to the democratic principles on which American society is built, every person should have a free and equal opportunity to pursue individual goals and desires. However, so that one individual's pursuit of happiness does not infringe upon another's, the citizens of this country, through the electoral and legislative processes, agree upon certain guidelines for their behavior. These guidelines comprise our system of law.

However, at times individuals come into conflict with one another, in spite of the system of laws. The reasons for conflict are varied. Laws do not cover every possible situation. Often the individuals involved do not know or understand the law. In certain cases an individual deliberately chooses to break the law.

Whenever a dispute arises between individuals or between an individual and the government, or whenever an individual offends the general will of the people by breaking the law, a solution must be found that is in harmony with the principles of our society. The solution might be a clarification of the rights of the parties; a determination of right and wrong, or guilt and innocence; a direction to one individual to take certain actions to make up for harming another's rights; or even a fine and/or a sentence as punishment for breaking the law.

A ***trial*** is a widely recognized means for settling such disputes. However, going to court usually should be the last resort in seeking a solution. People should try to work out their problems first in one-to-one communication, or with a third person. However, when these methods fail, parties to the dispute sometimes go to a trial to find a solution. A trial is an "*adversary process.*" This means that two or more persons who are in conflict present their arguments and their evidence before a third party not involved in the dispute, who then renders a decision. The "impartial" third party that renders the decision can be a judge or a jury. The judge or jury functions as the "*trier of fact.*"

The Parties

A trial revolves around an argument involving two or more people. The people who bring their argument to the trial are called the "*parties* " to the case.

A civil trial involves one person complaining about something another person did or failed to do. The person who does the complaining is called the "*plaintiff*," and the person who is the object of the complaint is the "*defendant*."

In a criminal trial, a person is accused of a particular act which the law calls a crime, such as murder, robbery, or fraud. The person who does the accusing is the "*prosecutor*." The prosecutor speaks on behalf of the government, which in turn represents the people of the state or nation. The person who is accused of the crime is the "*defendant*."

Except in a few special circumstances (most notably small claims court cases in which lawyers frequently are not involved), both parties will hire and instruct lawyers to prepare their respective cases and to make their arguments in court.

The Facts of the Case

Long before a trial actually takes place, some argument or incident occurs. Perhaps there is a traffic accident; a husband and wife decide they can no longer live together; someone is robbed at gunpoint. The argument or incident involves many facts, which together make up the "*case.*" Persons on opposite sides of a case often will view the facts quite differently. This disagreement over the facts of an incident forms the basis for a trial.

In a trial, the parties present their differing versions of the facts before an impartial "*trier of fact,*" a judge or a jury. The job of the trier of fact is to decide which facts are correct.

The Evidence

While the description of the facts of the argument or incident as presented by each party is important, the trier of fact usually needs a lot more information in order to make a decision. The version of the facts given by the parties may be incomplete, or affected by their emotional state at the time of the incident. Or, in a few cases, parties might even give false versions of the facts.

For all of these reasons, the trier of fact needs more information than just the stories of each party. In a trial, the attorneys for each side present all of the factual information they can gather to support their side of the case. This information is called "*evidence.*"

Evidence may take several forms including:

- **Testimony**: A person, called a "*witness*," tells the court what he or she saw, heard, did, or experienced in relation to the incident in question.
- **Documents**: Letters, notes, deeds, bills, receipts, etc.., that provide information about the case.
- **Physical Evidence**: Articles such as weapons, drugs, clothing, etc.., that can provide clues to the facts.
- **Expert Testimony**: A professional person, someone not involved in the incident, who can give medical, scientific, or similar expert instruction to help the trier of fact decide the importance of the evidence presented.

The Burden of Proof

To guarantee that the trial process is fair to everyone involved, certain legal principles govern the way parties present their evidence, and the way the judge or jury considers the evidence and makes a decision.

One of the most important rules concerns which party must prove his or her version of the facts, and how convincing he or she must be. This rule is called the "*burden of proof.*"

In a civil case, the person who brings the case to court and does the complaining (the plaintiff) has the burden of proof. Plaintiffs must convince the judge or jury that these facts are correct "*by a preponderance of the evidence*," meaning that their evidence is slightly more convincing than the defendants'. Some refer to this as meaning that 51 percent or more of the evidence supports plaintiffs' side.

In a criminal case, the burden of proof is considered to be much stricter, because the defendant may go to prison if the prosecutor proves the state's case. Therefore, the prosecutor must convince the judge or jury "*beyond a reasonable doubt* " that the accused committed the crime. Some state that "beyond a reasonable doubt" means that the trier of fact (judge or jury) must be at least 95 percent sure that the prosecutor is correct.

The Defense

As described above, the complaining or accusing parties usually have the burden of proving their particular version of the facts. The job of the defense team is to present evidence which prevents the plaintiff or prosecutor from meeting the burden of proof. Defense evidence should explain, disprove, or discredit the evidence presented by the other party. For example, in a traffic accident case, suppose the plaintiff presents a witness who testifies that the defendant was speeding just prior to hitting the plaintiff's car in an intersection. The defense could then present a witness who tells the court that the plaintiff, who was hit while making a left turn, failed to signal before making the turn. The defense could also try to show that the defendant was not speeding at all. This defense testimony weakens the plaintiff's case by presenting an alternative explanation for the accident.

In criminal cases, defendants try to discredit the evidence presented by the prosecutor in a variety of ways, including:

(1) presenting evidence to show that the defendant was not present at the scene of the crime (called an "alibi");
(2) showing that the defendant was acting to protect him or herself (self-defense); and
(3) presenting medical evidence showing that the defendant was mentally deranged at the time of the crime (insanity defense).

Preparation for Trial

Attorneys are responsible for collecting all of the evidence that supports the side of the case they are representing and for deciding how to present that evidence at the trial. It is the attorney's job, therefore, to work out a strategy for the trial.

In general, there should not be any surprises at the trial (contrary to popular belief) if the attorneys are well prepared. This lack of surprises is also due to the fact that the attorneys for the opposing sides must let each other know what evidence they have collected. This advance sharing of information is called "*discovery.*" Discovery enables both sides to prepare their cases as well as possible, to ensure that the trial is fair.

Before the trial, witnesses might make "*affidavits,*" which are written statements of the facts, made voluntarily and sworn to, usually in the presence of a notary or other person authorized to administer oaths. Witnesses might also be required to give a "*deposition,*" which is testimony given out of court. At a deposition, attorneys for both sides are present to question the witness, while a stenographer records the testimony for later use in court.

During this period before the trial, attorneys must also spend time preparing for what they will actually say and do at each step in the trial.

Cast of Characters

- **Judge** - Will preside over the trial and charge the jury. Whoever plays the role should become familiar with the rules of evidence, in order to rule on lawyer objections. Alternatively, use a panel of judges (say three) who can share the responsibilities for rulings and charging the jury.
- **Court Officer** - Will swear the jury and witnesses, and assist the judge in keeping order.
- **Prosecutor or Plaintiff's Attorney(s)** - Responsible for presenting the state's case in a criminal trial or the plaintiff's case in a civil trial, and cross-examing defense witnesses. There may certainly be a team of attorneys representing each side in the dispute.
- **Defendant's Attorney(s)** - Responsible for presenting the defendant's case and cross-examining the prosecution witnesses or plaintiff's witnesses. Again, a team of attorneys is a good approach. Be sure each attorney has a chance to ask questions of a witness.
- **Jurors and Jury Foreperson** - A Maine civil jury has eight jurors; a criminal jury has twelve jurors. The jurors elect one of their number to be foreperson; this juror presides during the jury deliberations and delivers the verdict in the courtroom.
- **Witnesses** - As needed for each case, but at a minimum the plaintiff and the defendant in a civil trial.

Trial Procedure

The following is an outline of the trial procedure which should be followed in a mock trial.

Voir Dire

This is the process by which the judge and attorneys choose a jury - literally *to see / to speak* in French. It is so called because the judge and attorneys ask questions of prospective jurors. An attorney may refuse to accept a juror in one of two ways: either by means of a "*challenge for cause,*" which removes a potentially unfair juror; or by a "*peremptory challenge,*" for which no reason need be given. An attorney has only a limited number of peremptory challenges, the number determined by the nature of the charges. There may be unlimited challenges for cause, which are decided by the judge. If challenges are used, the limit on peremptory challenges should be set at between 3-5.

Swearing of the Jury

Jurors promise to keep an open mind throughout the trial, to favor neither side, to ignore any publicity about the trial, and to follow the instructions of the judge. Students can write an oath to administer to the jurors.

Opening Statements

In a criminal trial the prosecutor always goes first, having the burden of proof. The prosecutor makes an opening statement, setting forth what s/he expects to prove. The defense may make an opening statement, but is not required to do so by law. In a civil trial the plaintiff's attorney first makes an opening statement, and the defense may follow with an opening statement or wait until the completion of the plaintiff's case. After the opening statements the judge reminds the jurors that opening statement are not proof, and that nothing said by the attorneys is to be considered as proof of anything in the case.

Direct Examination of Witnesses

Each witness is sworn by a court officer, who asks: "Do you solemnly swear that the testimony you are about to give is the truth, the whole truth, and nothing but the truth?" The witness is then questioned by the attorney for the party on whose behalf the witness is testifying. Leading questions (those which tend to suggest the answer) may not be used. Example of a leading question: "Weren't you at home at 8 o'clock last night?" Example of a non-leading question: "Where were you at 8 o'clock last night?"

Cross Examination of Witnesses

The attorney for the other party tries to discredit the witness, by asking questions to show that the witness' original testimony was in error or unreliable. Leading questions may be asked.

Order of Witnesses

In a criminal trial all the prosecution witnesses testify first. Then the prosecutor "rests" his or her case, telling the judge that s/he has submitted all available proof. In a civil trial ordinarily the plaintiff's witnesses are examined first, after which the plaintiff's attorney "rests." In either case the defense then puts on its witnesses, after which the defense "rests."

Summation by the Defense

The defense attorney may speak directly to the jurors for one last time, telling them why they should find the defendant "not guilty" in a criminal trial, or why they should find for the defendant in a civil trial.

Summation by the Prosecution or Plaintiff

This is the final opportunity for the prosecutor or plaintiff's attorney to speak directly to the jurors, explaining why the evidence shows the defendant is "guilty" or why they should find in favor of the plaintiff.

Judge's Charge to the Jury

The judge tells the jury what the law is in the case, and instructs the jurors on the burden of proof. Sample instructions in a criminal case and in a civil case are included.

Jury Deliberation

The jurors "retire" - they go to a room where they are alone together - to review and discuss the evidence, then vote as to whether they find for the plaintiff or for the defendant. In a criminal case, the vote must be unanimous to reach a verdict. In a civil case, it requires two-thirds of the jurors, or six of the eight jurors.

Jury Verdict

The jury announces to the court whether it has found the defendant guilty or not guilty in a criminal case, or whether it has found for the plaintiff or defendant in a civil case. In either trial the jury may be unable to reach a decision, which is called a "hung jury." When this happens the case may be re-tried at a later date, or it may be dropped.

Source: Street Law Mock Trial Manual, National Institute for Citizen Education and the Law. Used by permission. Additional material by Bill of Rights Working Group.

Simplified Rules of Evidence

So that each party to a trial can be assured of a fair hearing, certain rules have been developed to govern the types of evidence that may be introduced in a trial, as well as the manner in which evidence may be presented. These rules are called the "*rules of evidence*." The attorneys and the judge are responsible for enforcing these rules. Before the judge can apply a rule of evidence, an attorney must ask the judge to do so. Attorneys do this by making "*objections*" to the evidence or procedure employed by the opposing side. When an objection is raised, the attorney who asked the question being objected to will usually be asked by the judge to respond. A response should tell the judge why the question was not in violation of the rules of evidence.

The rules of evidence used in real trials can be very complicated. A few of the most important rules of evidence have been adapted for mock trial purposes, and these are presented below.

Rule 1. Leading Questions:

A "leading" question is one which suggests the answer desired by the questioner, usually by stating some facts not previously discussed and then asking the witness to give a "yes" or a "no" answer.

Example: "So, Mr. Smith, you took Ms. Jones to a movie that night, didn't you?"

Leading questions may not be asked on direct examination. Leading questions may be used on cross examination.

Objection: "Objection, Your Honor, counsel is leading the witness." (Opposing Attorney)
Possible Response: "Your Honor, leading is permissible on cross examination," or "I'll rephrase the question." For example, the above question would not be leading if rephrased as "Mr. Smith, where did you and Ms. Jones go that night?" (This would not ask for a "yes" or "no" answer.)

RULE 2. Narration:

"Narration" occurs when the witness provides more information than the question called for.

Example: Question, "What did you do when you reached the front door of the house?" Witness, "I opened the door and walked into the kitchen. I was afraid that he was in the house—you know he had been acting quite strangely the day before."

Witnesses' answers must respond to the questions. A narrative answer is objectionable.

Objection: "Objection, Your Honor, the witness is narrating."
Response: " Your Honor, the witness is telling us a complete sequence of events."

RULE 3. Relevance:

Questions and answers must relate to the subject matter of the case; this is called "relevance." Questions or answers that do not relate to the case are "irrelevant."

Example: (In a traffic accident case) "Mrs. Smith, how many times have you been married?"

Irrelevant questions or answers are objectionable.

Objection: "Your Honor, this question is irrelevant to this case."
Response: "Your Honor, this series of questions will show that Mrs. Smith's first husband was killed in an auto accident, and this fact has increased her mental suffering in this case."

Rule 4. Hearsay:

"Hearsay" is something the witness has heard someone say outside the courtroom.

Example: "Harry told me that he was going to visit Mr. Brown."

Hearsay evidence is objectionable.

However, there are a number of exceptions to the hearsay rule and if an exception applies, the court will allow hearsay evidence to be testified to.

One exception is permitting hearsay evidence when the witness is repeating a statement made by one of the parties in the case. (For mock trials, other exceptions to the hearsay rule usually are not used.) Another example of an exception is when the witness who made the statement has died or is otherwise unable to testify.

Objection: "Objection, Your Honor, this is hearsay."
Response: "Your Honor, since Harry is the defendant, the witness can testify to a statement he heard Harry make."

Rule 5. Firsthand Knowledge:

Witnesses must have directly seen, heard, or experienced whatever it is they are testifying about.

Example: "I know Harry well enough to know that two beers usually make him drunk, so I'm sure he was drunk that night, too."

A lack of firsthand knowledge is objectionable.

Objection: "Your Honor, the witness has no firsthand knowledge of Harry's condition that night."
Response: "The witness is just generally describing her usual experience with Harry."

Rule 6. Opinions:

Unless a witness is qualified as an expert in the appropriate field, such as medicine or ballistics, the witness may not give an opinion about matters relating to that field.

Example: (Said by a witness who is not a doctor) "The doctor put my cast on wrong. That's why I have a limp now."

Opinions are objectionable unless given by an expert.

As an exception to this rule, a lay witness may give an opinion about something in common experience, e.g., "He seemed to be driving pretty fast for a residential street."

Objection: "Objection, Your Honor, the witness is giving an opinion."

Response: "Your Honor, the witness may answer the question because ordinary persons can judge if a car is speeding."

Special Procedures

Procedure 1. Introduction of Documents or Physical Evidence:

Sometimes the parties wish to offer as evidence letters, affidavits, contracts, or other documents, or even physical evidence such as a murder weapon, broken consumer goods, etc. Special procedures must be followed before these items can be used in trial.

Step 1: Introducing the Item for Identification

(1) The attorney says to the judge, "Your Honor, I wish to have this (letter, document, item) marked for identification as (Plaintiff's Exhibit A, Defense Exhibit I, etc.)."
(2) Attorney takes the item to the clerk who makes the appropriate marking.
(3) Attorney shows the item to the opposing counsel.
(4) Attorney shows the item to the witness and says, "Do you recognize this item marked as Plaintiffs Exhibit A?". Witness: "Yes." Attorney: "Could you please identify this item?" Witness: "This is a letter I wrote to John Doe on September 1." (Or witness gives other appropriate identification.)
(5) Attorney may then proceed to ask the witness questions about the document or item.

Step 2: Moving the Document or Item into Evidence

If the attorney wishes the judge or jury to consider the document or item itself as part of the evidence, and not just the testimony about it, the attorney must ask to move the item into evidence at the end of the witness examination. The attorney proceeds as follows:

(1) Attorney says, "Your Honor, I offer this (document or item) into evidence as Plantiff's Exhibit A, and ask that the Court so admit it."
(2) Opposing counsel may look at the evidence and make objections at this time.
(3) Judge rules on whether the item may be admitted into evidence.

Procedure 2. Impeachment:

On cross examination, the attorney wants to show that the witness should not be believed. This is best accomplished through a process called "impeachment" which may use one of the following tactics:

(1) Asking questions about prior conduct of the witness that makes the witness' truth-telling ability doubtful (e.g., "Isn't it true that you once lost a job because you falsified expense reports?").
(2) Asking about evidence of certain types of criminal convictions (e.g., "You were convicted of shoplifting, weren't you?").
(3) Showing that the witness has contradicted a prior statement, particularly one made by the witness in an affidavit.

In order to impeach the witness by comparing information in the affidavit to the witness' testimony, attorneys should use this procedure:

Step 1: Introduce the affidavit for identification, using the procedure described in Procedure 1.

Step 2: Repeat the statement the witness made on direct examination that contradicts the affidavit. Example: "Now, Mrs. Burke, on direct examination you testified that you were out of town on the night in question, didn't you?" (Witness responds, "Yes.")

Step 3: Ask the witness to read from his or her affidavit that part which contradicts the statement made on direct. Example: "All right, Mrs. Burke, could you read paragraph 3?"
(Witness reads, "Harry and I decided to stay in town and go to the theater.")

Step 4: Dramatize the conflict in the statements. (Remember, the point of this line of questioning is to demonstrate the contradiction in the statements, not to determine whether Mrs. Burke was in town or out of town.) Example: "So, Mrs. Burke, you testified that you were out of town on the night in question. Yet, in your affidavit you said you were in town, didn't you? There seems to be a conflict here, doesn't there? If you can't remember that fact correctly, it's possible you can't remember the others, isn't it?"

Source: Street Law Mock Trial Manual, National Institute for Citizen Education and the Law. Used by permission.

Judge's Instructions To Jury (Civil Case)

It is my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your job exclusively to determine the facts in the case, and to consider and weigh the evidence for that purpose.

(Judge gives the applicable law, reading the statutute or explaining the law which applies to the case.)

By no remark made by the Court during the trial, nor by these instructions, does the Court express any opinion as to the facts in this case or what verdict you should return.

Statements of counsel are not to be regarded by you as evidence, and you will disregard any such statements which are not supported by the evidence received in this trial.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action.

In your deliberations you will consider only the testimony of the witnesses upon the witness stand and exhibits that have been admitted in evidence. No juror shall allow himself or herself to be influenced by anything which he or she may have seen or read outside of the evidence and exhibits received by the Court during the course of this trial.

In weighing the testimony of any witness, you should take into account his or her interest or lack of interest in the result of the case, his or her appearance upon the witness stand, his or her manner of testifying, his or her apparent candor or lack of it, and whether he or she is supported or contradicted by the facts and circumstances as shown by the evidence. You have a right to believe all the testimony of a witness, or believe it in part and disbelieve it in part, or you may reject it altogether.

Every witness is presumed to speak the truth. However, you may determine a witness' truthfulness for yourself by the manner in which he or she testifies, by the character of his or her testimony, by evidence affecting his or her reputation for truth, honesty, and integrity, by his or her motives or by contradictory evidence.

You are the sole judges of the weight of the testimony and the credibility of the witnesses, and it is solely and exclusively for you to determine what the facts are, and this you must do from the evidence produced here in this trial, and then apply the law as stated to you in these instructions.

In a civil action such as the one we are now trying, the party who asserts that something is true must carry the burden of proving it. In other words, the "burden of proof" as to that issue is on that party. This means that if no evidence were given on either side of that issue, your finding would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence. That means evidence which, when weighed against opposing evidence, has more convincing force, and has more probablilty of being the truth. Should the conflicting evidence be evenly balanced on either side of the issue, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without abandoning your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is wrong. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favors such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

When you retire to your jury room you will choose one of your number as foreperson, who will deliver your verdict.

Six or more of your number concurring may return a verdict. (For a civil jury of eight persons.)

Judge's Instructions To Jury (Criminal Case)

It is the duty of the judge to instruct the jury on the law applcable in this case, and it is your duty as jurors to follow the law as I shall state it to you.

(Judge gives the applicable law, reading the statute the defendant is charged with violating.)

The function of the jury is to try the issues of fact that are presented by the allegations in the charges filed in this Court and the defendant's plea of "not guilty." This duty you shall perform without the influence of passion or prejudice. You must not allow yourselves to be biased against a defendant because of the fact that he or she has been arrested for this offense, or because any charges have been filed against him or her, or because he or she has been brought before the Court to stand trial. None of these facts is evidence of his or her guilt, and you are not permitted to infer or to speculate from any or all of them that he or she is more likely to be guilty than innocent.

By no remark made by the Court during the trial, nor by these instructions, does the Court express any opinion as to the facts in this case or what verdict you should return.

You are the sole judges of the credibility of all the witnesses who have testified in this case, and of the weight to be given their testimony. A witness is presumed to speak the truth, but this presumption may be overcome by the manner in which he or she testifies; by the nature of his or her testimony; or by the evidence affecting his or her character for truth, honesty, integrity or motives; or by contradictory evidence. In determining the weight to be given to the testimony of any witness, you have a right to consider the appearance of each witness on the stand, his or her manner of testifying, his or her apparent candor or lack of candor, his or her apparent fairness or lack of fairness, his or her apparent intelligence or lack of intelligence, his or her knowledge and means of knowledge on the subject upon which he or she testifies, together with all the other circumstances appearing in evidence during the trial.

The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in this case.

A witness false in one part of his or her testimony is to be distrusted in others.

The Court instructs the jury that a defendant in a criminal action cannot be compelled to be a witness against himself or herself, but he or she may be sworn and may testify in his or her own behalf, and the jury in judging his or her credibility and the weight to be given his or her testimony may take into consideration the fact that he or she is the defendant and the nature and the enormity of the crime of which he or she is accused.

The burden of proof exists upon the prosecution throughout the trial to establish the guilt of the accused beyond a reasonable doubt, and a conviction is not warranted unless this burden is sustained.

A reasonable doubt is not just any doubt. The prosecution does not have the burden of proving its case to a moral certainty. It is rather a doubt for which you can give a reason that is likely to convince yourself or others. If the prosecution does not prove that a crime was committed and the defendant committed it, to your reasonable satisfaction, you must find the defendant not guilty.

Mock Trial (Criminal)

TEXAS V. JOHNSON

CHARACTERS:

JUDGE(S)
COURT OFFICER(S)
PROSECUTOR(S)
DEFENSE ATTORNEY(S)
GREGORY "JOEY" JOHNSON
DANIEL WALKER
FOREPERSON OF THE JURY & ADDITIONAL JURORS

TRIAL PREPARATION:

JUDGE: Should have and be familiar with Simplified Rules of Evidence and Trial Procedure, and the charge to the jury. Will need to preside over the trial, including voir dire, be able to rule when objections are made during the trial, and charge the jurors as to the law at the end of the trial.

COURT OFFICER: Must know the oath for jurors and witnesses.

PROSECUTING AND DEFENSE ATTORNEY(S): Must prepare: questions to ask the jurors on Voir Dire, Opening Statement and Summation, questions for the Direct Examination of Daniel Walker, and questions for the Cross Examination of Gregory Lee Johnson. If there are enough interested students, as many as 5 attorneys for each side would not be unusual for such a case as this. Those questioning should have and be familiar with Simplified Rules of Evidence and Trial Procedure, to be able to frame their own questions, object to improper questioning by the other side, and defend their questions when objections are made. They must also have the fact sheets for Walker and Johnson, and a copy of the Texas statute that Johnson is charged with violating.

GREGORY LEE ("Joey") JOHNSON: Should have the fact sheet based on the People Magazine article (July 1989). Needs to be able to create a character from this. Must prepare with the defense attorneys for direct and cross-examination. Should NOT meet with prosecutors in advance.

DANIEL WALKER. Should have the fact sheet from the People Magazine article, and be able to create a compelling character as well. Must prepare with the prosecution, especially so that every element of the statute is brought out on direct examination.

TEACHING NOTES: Do not have Johnson and Walker memorize lines. It will be more effective if they are simply very familiar with what occurred. Jurors should have no knowledge of the case if possible, so you may want to use students from another class. Voir Dire should take about one class period. The rest of the trial, excluding deliberation, should take about an hour. It may take up to a full class period for the jurors to deliberate and reach a verdict. They may deliberate in front of the trial participants, who should not interrupt them (fishbowl technique).

JUDGE'S CHARGE TO THE JURY

Ladies and Gentlemen of the Jury, it is my duty to explain to you the law in this case, that the Defendant, Gregory Lee Johnson, is charged with violating. The specific statute is Texas Penal Code, Section 42.09. It states that: "A person commits an offense if he intentionally or knowingly desecrates a state or national flag. Desecrate means deface, damage, or otherwise physically mistreat the flag in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."

Therefore, to find Mr. Johnson guilty of the crime with which he is charged, you must unanimously believe, beyond a reasonable doubt, that on the 4th of August, 1984, in the City of Dallas, State of Texas, the defendant, Gregory Lee Johnson did destroy an American flag, not by accident, and that he knew that his doing so seriously offended Daniel Walker, who was likely to and did observe his action. You must also find that Mr. Walker's distress was reasonable under the circumstances.

What is a reasonable doubt? It is not just any doubt. The prosecution does not have the burden of proving its case to a moral certainty. It is rather a doubt for which you can give a reason that is likely to convince yourself or others. It is not necessary that you believe that someone else committed the crime with which Mr. Johnson is charged, or that no crime in fact occurred. If the prosecution does not prove that a crime was committed and that Gregory Lee Johnson committed it, to your reasonable satisfaction, you must find him not guilty.

The prosecution in this and every criminal case has the burden of proof. This means that the responsibility for proving every element of the crime set forth in the statute belongs to the prosecution. It is in no way Gregory Lee Johnson's responsibility to prove that he did not commit the crime charged. He is presumed innocent unless you unanimously vote to find him guilty as charged.

APPLICABLE LAW

Texas Penal Code Annotated Sec. 42.09 (1969)
Desecration of Venerated Object

(a) A person commits an offense if he intentionally or knowingly desecrates: (1) a public monument; (2) a place of worship or burial; or (3) a state or national flag. (b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action. (c) An offense under this section is a Class A misdemeanor.

Constitution of the United States of America
Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(The First Amendment has been applied to the states and state laws by the Fourteenth Amendment due process clause.)

Fact Sheet

Gregory "Joey" Johnson:

Joey Johnson, 32, is an avowed communist who considers the flag "a symbol of oppression, international murder and plunder." He describes the U.S. as a "sick and dying empire." Born in Richmond, Indiana, he grew up in a poor, racially mixed neighborhood. When he was only 2, his father was jailed for theft and then spent the next several years in and out of prison. His mother married a staff sergeant in the U.S. Army. The family moved to a U.S. military base in West Germany in 1969—when the Vietnam War was at its height—and Johnson, then 12, began hanging out with soldiers as he peddled the military newspaper. He was infected, he says, by the growing radicalism in the ranks, particularly among black draftees.

After the family returned to the states and settled in Tampa, Johnson dropped out of high school and joined the Merchant Marine. During trips to Panama and Mexico, he says, he was appalled to see "U.S. corporations, the military presence, Kentucky Fried Chickens and Dairy Queens. I realized how pervasive an octopus America is, with its tentacles everywhere. So much wealth and power. I hated the whole setup."

Resettling in Tampa in 1976, Johnson was recruited by the Revolutionary Communist Youth Brigade. An itinerant demonstrator ever since, he has joined protests around the country and has been arrested more than 20 times.

The incident in Dallas that led to his trial and the Supreme Court case was the crowning moment in his career as a protestor. Denouncing Ronald Reagan and his "new patriotism," Johnson joined some 100 fellow demonstrators on a rampage through several corporate offices before collapsing on the floor for a melodramatic "die-in." He staged the final drama outside City Hall, when a flag was doused with lighter fluid and set afire. "America, the red, white and blue, we spit on you," chanted the crowd. Johnson says about being hauled off by police, "Thousands of flags, and one got burned. This is a threat?"

Daniel Walker:

Daniel Walker was a bystander at the Dallas demonstration. A West Point graduate and Korean War veteran, he fought back tears as he watched the flag turn to glowing embers on the sidewalk, then quietly gathered up the ashes. Later he buried the remains in his backyard in Fort Worth. Walker, now 61, says the Supreme Court decision "makes me sick. I hate what Johnson did. I can't help but think of all the people who have paid such a high price for the flag and the freedom it represents."

Mock Trial (Civil)

TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT

Background Facts:
Mary Beth Tinker and her brother John wanted to express their opposition to the Vietnam War. They decided to wear black armbands to school in order to symbolize their opposition to the war and their support for a truce. Upon learning of this plan, the principals of the city schools met and adopted a policy that anyone wearing armbands would be asked to remove them. If they refused, they would be suspended until they returned without the armbands to their schools. Mary Beth, her brother, and another student wore black armbands to their schools. Though some students argued over the Vietnam issue in the halls, there was no violence. All three were suspended from school until they came back without their armbands.

Plaintiff's Witness: John E. Tinker
You are a student at North High School. You are 16 years old. You, your parents, and your friends have been against the American involvement in the Vietnam War from the beginning. You feel that there is no justification for American participation in a foreign "civil war". You have participated in antiwar protests in the past, and, along with your parents and friends, you decided to wear a black armband to display your support for the continuation of the Christmas truce and your grief for those who have died in Vietnam. Your sister, Mary Beth, age 13, and your friend, Christopher Eckhardt, age 15, wore their armbands on Monday, but you were a little hesitant. However, after Mary Beth and Chris were suspended, you decided to wear your armband on Tuesday. You felt self-conscious because of the stares your armband drew, but you felt determined that it was your right to express your views in this way. After third period, you were called to the principal's office. Upon your refusal to take off the armband, you were suspended.

Witness for the Defense: Andrew Burgess, principal of North High School
You are the principal of North High School. You heard about the upcoming armband demonstration and called an administration meeting to head off the problem. The administrators, fearing a disruption of the school program, decided to ban the wearing of armbands. The community is deeply divided over the war and you feared that any disturbance could lead to a major conflict. On Monday, you suspended Chris Eckhardt when he refused to remove his armband. The following day, you suspended John Tinker when he refused to remove his armband. You concede that no classes were actually disrupted by the students wearing the armbands, but you feel that it clearly took the minds of the students off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam War. You also feel that it was obvious that the purpose of the armbands was to attract attention to the issue of Vietnam, which was why the students refused to remove them. You feel that had you allowed the armbands to continue to be worn, the hostile comments between students in the hallways could have turned to violence and in any event, certainly distracted students from their studies.

Instructions for lawyers for Tinkers (Plaintiffs):
In questioning your witness, you will want to bring out the basic facts in the case, and will want to stress the facts that your client acted out of deep conviction and that he had no desire to display contempt for school authority or wish to cause a disturbance.

In cross-examining the principal, you will want to try to show that the school authorities singled out a particular topic (the Vietnam War) to prohibit. Your chief concern is to show that the regulation was unreasonable or could not be reasonably defended as being necessary to the functioning of the school system.

Instructions for lawyers for the school district (defendants):
Your prime concern in examining your witness is to display the fact that "there was reason to expect that the protest would result in a disturbance of the scholarly, disciplined atmosphere within the classroom and halls of your school." On cross examination of the plaintiff, your purpose is only to ascertain whether he was aware of the regulation.

ONE ATTORNEY FOR EACH SIDE SHOULD BE PREPARED TO MAKE A CLOSING ARGUMENT TO THE JURY SUPPORTING YOUR CLIENT'S POSITION IN THIS CASE. THE ARGUMENT MUST BE BASED UPON THE TESTIMONY AND THE LAW. YOU MIGHT WISH TO REVIEW OTHER RELEVANT FIRST AMENDMENT CASES TO GIVE YOU IDEAS ABOUT THE THRUST OF YOUR ARGUMENT.

Sample Lessons for Selected Bill of Rights Cases

First Amendment

Solmitz v. Maine School Administrative District No. 59

1. Outside Speakers
You could invite in your school's principal and/or school committee members to discuss how they would react to such a case.

2.Mock Appellate Court Hearing
Use the facts of this case or add to those facts as the basis for a mock appellate court hearing.

3. Hypothetical analysis
You can challenge students to think through their ideas by using hypotheticals which vary the actual facts of the case.

For example:
What if a Tolerance Day-like panel were organized by all the health teachers or social studies teachers in the school, and all students were going to have such panels in their individual health or social studies classes?

What if there were no bomb threats but parents threatened to picket the school?

What if the school board had permitted Tolerance Day to go forward but without the homosexual speaker?

What if a teacher is himself or herself a homosexual?

Stanton v. Brunswick School Department

1. Comparison with other cases
Compare this case with the Hazelwood case. Would this case come out differently if it arose after Hazelwood instead of before? This could lead to a general discussion of the structure of the federal court system.

2. Discussion of School Policies
It would be interesting to bring in the yearbook editor and/or faculty advisor from your school to have them discuss the policies they apply.

3. Mock Trial
You could form a hypothetical situation concerning your school's yearbook. Perhaps prepare witness statements from various people such as the yearbook editor, the faculty advisor, the principal and so on. You could even gather yearbooks from past years and have students investigate whether their school's yearbook would be considered a public forum. Many of the witnesses called could play themselves.

4. Student Policies
Challenge students to come up with policies for screening yearbook statements that would accomplish the same result as the Brunswick school administration wanted to accomplish but that could survive examination by a court.

Sheck v. Baileyville School Committee

1. Outside Speaker

The school librarian could be used as a resource to familiarize students with their own school's policies concerning removal of books from the library.

2. Constitutional Issue Search

Because this case involves both First Amendment rights and due process rights, have students find the parts of the Constitution that are directed to these protections. Have students debate whether this is really a First Amendment case or a due process case.

3. Adversary Debate

Have students debate whether the Challenged Materials Policy adopted by the Baileyville School Committee provides enough protection of their constitutional rights. This could be followed up by challenging students to write up their own policies.

Bookland of Maine, Inc. v. City of Lewiston

1. Outside Speakers

Especially if your school is close to either Portland or Old Orchard Beach, where there are local laws regulating obscenity, there are opportunities for outside speakers. For example, get a prosecuting attorney and a defense attorney who has actually been involved in one of these cases.

2. Adversarial Debate

Because of strong feelings on both sides of this issue, it is ripe material for an adversarial debate. For the same reason, you could set up a mock appellate court hearing.

3. Hypothetical Analysis

All freedom of speech cases present fertile opportunities for challenging students to think critically using hypotheticals. First develop student opinions about this case, and then pose changes to the facts.

For example:
Songs or publications depicting blatantly racist or anti-women views
Michelangelo's "David"
Playboy
Extremely violent movies or TV programs
Use of sexual appeals in commercials

Texas v. Gregory Lee Johnson

1. Adversary Debate or Mock Appellate Court Hearing

Do not miss the opportunity to let students present their arguments and points of view in this case by using a simulation strategy.

2. Judicial Restraint versus Judicial Activism

The differing opinions in this case present a nice contrast of the judicial restraint (dissent) versus judicial activism (majority) approach to interpreting the Constitution. Have students generate plusses and minuses of each approach. Discuss the relationship between democratic principles and each one of these principles.

3. Hypothetical Analysis

The issue which is ripe for development through hypothetical is when conduct is also speech. Have students generate opinions and then challenge their views with hypotheticals.

For example:
Giving someone the finger
Giving a Peace sign
Burning a cross
Wearing a flag on the seat of the pants

4. Discussion Questions

a. Would it be OK to burn a flag you did not want?
b. Would it be O.K. to burn a picture of a flag?
c. What do other countries say about their flags in this regard?
d. If, as the dissent says, the job of government in a democracy is to protect the majority, would the dissenters have agreed flag-burning was protected by the First Amendment if that is what the majority of people agreed was right? Or is there a fundamental issue here of Constitutional right and wrong that transcends the politics of the moment?
e. Which is more important — the doctrine of freedom of speech or the ability to burn a flag?
f. If flag-burning were illegal, how would it be enforced?

Employment Division, Department of Human Resources of Oregon v. Smith

1. Hypothetical Examination

Before or after study of this case, challenge students to generate their own ideas about who is right. And challenge students to think critically about their own ideas by posing hypothetical cases.

For example:
Satanic practices
Injecting heroin for God
Conscientious Objectors to war
Paying taxes to support immoral causes
Saying Pledge of Allegiance

2. Mock Appellate Court Hearing

Use the facts of the case as a focus for an appellate court hearing.

3. Adversary Debate

Because of First Amendment v. Drugs aspect of the case, it has a strong emotional appeal and can provide an excellent focus for an adversarial debate following research of the issues.

Lynch v. Donnelly

1. Developing Evidence of Religious Influence in America

Have students generate a list of items of evidence which show the influence of religious belief in American history. For example, they can look at the Constitution itself, the Declaration of Independence, the dollar bill, the Star Spangled Banner, the Pledge of Allegiance, public celebrations of Christmas. This might be done more effectively before this case is studied as an introduction to the case.

2. Mock Trial

The evidence generated above might be used in a mock trial concerning the practices of your town in publicly acknowledging Christmas. Witnesses such as town officials could be brought in , or students could be assigned those roles after researching the town's practices. Some students might be assigned to play the roles of people who might be offended by acknowledgments of Christmas.

3. Hypothetical Analysis

There are many examples that can be used to test this opinion and force students to examine their own ideas.

For example:
A creche without the accompanying Santa Claus
A cross included in the display
Public singing of Christmas carols
Public Christmas trees, holly, etc.
The high school band playing Christmas carols at the Christmas concert

Edwards v. Aguillard

1. Student Rewrites

After studying this case, challenge students to come up with a law which would accomplish more or less the same result the Louisiana Legislature wanted to accomplish without being found unconstitutional.This exercise is a nice way to force students to grapple with identifying the key issues and facts of the case. Depending on time availability a student-generated law might be made the subject of a mock appellate court hearing.

2. Background Speaker

While studying this case, it would be helpful to have a biology teacher explain how your school deals with the teaching of evolution and, if at all, with the teaching of creation science.

3. Study Starter

Before studying this case, it might be interesting to have the class watch the movie of the Scopes Monkey Trial, "Inherit the Wind."

4. Hypothetical Analysis

You can examine the key issues and challenge students to test their own opinions by discussing hypothetical examples.

For example:
What about a law passed in 1800's mandating study of evolution in addition to creationism?
What about a law mandating the teaching of Einsteinian physics in addition to Newtonian mechanics?
What about a law mandating the teaching of the heliocentric theory of the universe in the sixteenth century?
What if the Louisiana act had been part of an overall law demanding that scientific truths be taught as theories with an examination at the same time of criticisms of the theories?

Second Amendment

State of Maine v. Brown

1. Student Generated Ideas Beginner

Because the language of this Amendment is seemingly so absolute and the interpretations of it are so narrow, this case provides an intriguing subject for getting students to think about how they would interpret the language of the Amendment.
Some possible questions:
  What are arms?
  What is the effect of the common defense clause?
  Do the provisions in the Constitution about the control of militias have any bearing?
  What is "keep and bear" arms? Does that include shooting? How about concealing?
  Why do they think this is the second amendment in the Bill of Rights?

2. Adversary Debate

Because of emotional appeal of both sides, this case presents an excellent subject for an adversary debate. You might consider changing the facts a bit-perhaps assume a statute that prohibited guns for any person convicted of a criminal offense or a statute that prohibited handguns.

3. Federalism Discussion

Because this case involves some discussion of the Maine Constitution, it can be used as the focus for a discussion about the operations of our federal system. Pose hypotheticals for the class in which the provisions in the state and federal constitutions are either stronger or weaker than one another. Point out the "supremacy clause" in the U.S. Constitution. You could perhaps extend the discussion by doing the same thing for hypothetical constitutional provisions dealing with freedom of religion or obscenity.

4. Possible Outside Speaker Followup

National Rifle Association member v. gun control advocate.

Fourth Amendment

Michigan Department of State Police v. Sitz

1. *Adversary Debate*
This is a wonderful case for an adversary debate because of emotional issues on both sides—privacy v. dangers of drunk driving. It would be best preceded by library research or by giving teams fact sheets to study.

2. *Appellate Court Hearing*
For the same reason as above, could be excellent material for an appellate court hearing.

3. *Possible Followup*
Invite two attorneys into class to conduct their own mock appellate court argument.

4. *Judicial Restraint v. Judicial Activism*
This is an excellent case around which to center a general discussion of the attitude of judicial restraint v. judicial activism. The majority opinion is willing to give local officials wide leeway. The dissent is much more willing to step in to defend constitutional principles and to see threats to those principles.

New Jersey v. TLO

1. *Student-Generated Interpretations*
As an introduction review the language of the Fourth Amendment. Based on the language, get students to ask themselves questions such as:

What is reasonable? What are the factors to consider? Should a warrant always be required? Any exceptions? What is probable cause? How if at all should the Fourth Amendment apply in schools?

2. *Hypothetical Discussion*
This is an excellent case for a stimulating discussion that need not last more than one or two days. Can give students the facts only. Have them look at the Fourth Amendment. Generate their opinions. Then challenge them with hypothetical changes to facts.

For example:
What if there were a gun inside her purse?
What if TLO admitted smoking immediately after her purse were opened?
What about a locker instead of a purse?

3. *Student Generated Policy*
Based on the court's opinion, challenge students to generate their own search policies for schools. Have them consider:

- Nature of offense
- Gender
- Property searched
- Extent of permissible search
- Any search warrant requirement?

4. *Mock appellate court argument or adversary debate*
Use the facts of this case for students to present their own arguments on the issue.

5. *Possible Followup*
Discussion with assistant principal, police officer, or criminal defense attorney.

In Re Gault
State v. Friel
State v. Gleason

These Fifth Amendment cases do not lend themselves particularly well to mock trials, appellate hearings, or similar "role-playing." However, each involves eminently debateable questions of fundamental fairness: Do children have the same rights as adults? Is the juvenile justice system criminal, civil, both, or neither? Does it make a difference? Should it make a difference? Should someone be "rewarded" for misbehaving at his or her own trial?

To stimulate questions on these and other related issues, questions to encourage class debate appear below:

a. Why should guilty people be allowed to remain silent?

b. By allowing people to remain silent, won't some guilty people "get away with it?" Is this fair?

c. Can you think of ways to limit the right to remain silent, so that the government would have an easier time investigating and proving crimes? What risks do you run? Is this fair?

d. If the government is forbidden to use confessions, then some guilty people will be found not guilty by juries that could not hear their confessions. Why do you think the Supreme Court insists on this? What do you think?

e. In Gault, the justices wrote that confessions by children were likely to be "untrustworthy." Why did they believe this? What do you think? Are adults less vulnerable to this?

f. When you are accused of something, what is your first reaction? Does it make a difference whether you actually did the thing for which you are being blamed? What if you hadn't, but had done something else you were anxious to keep secret? How would you react then? How is this relevant in Gerald Gault's case? What about Michael Gleason's case?

g. In Friel, the behavior of both Dennis Friel and his lawyer Andrews Campbell in court was so objectionable that each was given a three day jail sentence for "contempt of court" by the judge at their trial. The judge then dismissed the case against Friel, because he felt that it was impossible under all the circumstances to have a trial that was fair to both Dennis Friel and to the State. The Supreme Court of Maine would not let the State retry Friel, on the grounds of double jeopardy. Do you think this was the correct decision? Why or why not? What else could the judge have done?

State of Maine v. Thibodeau

1. Role Playing a Suppression Hearing

A suppression hearing is an argument in front of a judge before a trial about whether certain evidence can be used against the accused. If it cannot be used it is "suppressed." This role playing technique is identical to that for an appellate argument. It simply takes place at a different procedural stage of the case.

a. Based on the reading, a Facts handout can be prepared. If there is time, witness statements can even be made. Distribute to students in groups.
b. Students prepare arguments for and against the use of evidence.
c. Other students can be judges.
d. Compare to the actual case after the simulation.

2. Hypothetical Analysis

Challenge students to express their opinions by making changes in facts.

Examples:
a. Thibodeau was 20, not 18; or 13.
b. Police before the first encounter had found the body or had heard shots fired .
c. Before the second encounter, police had a witness who had heard shots but they did not personally believe Thibodeau was a prime suspect .
d. Thibodeau sat in the front seat.

3. Guidebook for Police

Challenge students to come up with guidelines police should follow for giving Miranda warnings. Ask them to consider:

Length of questioning
Types of questions
Information known to police
What officers personally believe
What is interrogation? Does it require questions?
Suspect's state of body or mind

4. Followup Activity

Invite police officer, district attorney and/or criminal defense attorney to speak to class.

In Re Gault
State v. Gleason
Miranda v. Arizona

Discussion Questions
Both Gault and Gleason deal with juveniles asserting constitutional rights. Gerald Gault wins in the United States Supreme Court, while Michael Gleason loses in the Maine Supreme Court. Why do you think the results were different? Are there significant differences between the two cases? Why or why not, and, if so what are they?

Both Gault and Gleason refer to the case of Miranda v. Arizona. Review the rights established by the U.S. Supreme Court for criminal suspects in Miranda.

Which of these rights do you think is the most important? Why?

Rank these rights in order of importance.

If a suspect is unaware of his or her "rights," should the government have to make its own job more difficult by explaining them? Are the people most likely to know their rights those who have been previously arrested? Should this make a difference?

What does "in custody" mean? Does it only mean "under arrest?"

What if the accused person says something, but not in response to a question. Should this be allowed if the Miranda warnings were not given? Why or why not?

Doesn't Miranda just reward criminals for keeping their mouths shut? Is this fair?

Ninth Amendment

Women's Community Health Center, Inc. v. Cohen

1. Constitution Search/Discussion
An interesting way to approach this very controversial area of the law is to challenge students, alone or in groups, to study their Constitutions and note every single provision which seems to be based on protection of privacy. At the same time, challenge them to find every part that provides any guidance concerning whether a fetus is a person for constitutional purposes.

This would be an excellent way to introduce the more general topic: What is the role of courts in a democracy? Should courts be willing to extend general constitutional concerns for privacy into areas not mentioned specifically in the Constitution? Discuss the role of legislature versus the role of courts. You can even ask students to generate a list of plusses and minuses for broadly interpreting the Constitution from the standpoint of judges, legislators, and our democratic system.

2. Adversary Debate
Depending on your class, this subject could be excellent as a focus for an adversary debate preceded by student research.

References

Alderman, Ellen and Caroline Kennedy. In Our Defense: The Bill of Rights in Action. New York: William Morrow and Co., Inc., 1991.

Arbetman, Lee and Richard L. Roe. Great Trials in American History: Civil War to the Present. New York: West Publishing Co., 1985.

Brady, Sheila, Carolyn Pereira and Diana Hess. It's Yours: The Bill of Rights (Lessons on the Bill of Rights for Students of English as a Second Language). Chicago, IL: Constitutional Rights Foundation Chicago, 407 S. Dearborn Ave., Suite 1700., 1991.

Commission on the Bicentennial of the United States Constitution. 1791-1991: The Bill of Rights and Beyond. Washington, D.C.: U.S. Government Printing Office, 1991.

Lawson, Don. Landmark Supreme Court Cases. Hillside, NJ: Enslow Publishers, Inc., 1987.

Monk, Linda R. The Bill of Rights: A User's Guide. Alexandria, VA: Close-Up Publishing, 1991.

Patrick, John J. and Robert S. Leming, Resources for Teachers on the Bill of Rights. Bloomington, IN.: ERIC Clearinghouse for Social Studies/Social Science Education, Indiana University, 1991.

Rhodehamel, John H., Stephen F. Rohde, Paul Von Blum. Foundations of Freedom. Los Angeles, CA.: Constitutional Rights Foundation, 1991.

Educational Materials for Instruction on Bill of Rights

*The Center for Research and Development in Law-Related Education (CRADLE) has published a catalogue listing 1300 teacher-written lesson plans on the Bill of Rights. There are also 67 other resource materials produced by other organizations. Copies of "National Repository Catalog of Teacher-Developed Lesson Plans on Law and the Constitution" are available for a fee from: CRADLE, Wake Forest University School of Law, P.O. Box 7206, Reynolda Station, Winston-Salem, NC 27109; telephone 1-800-437-1054 or 919-759-5872.

*The American Bar Association publishes a free catalogue of Bill of Rights teaching resources. Contact Tammy Russo, A.B.A., Division for Public Education, 541 North Fairbanks Court, Chicago, IL. 60611-3314; telephone 312-988-5745.

*"Resources for Teachers on the Bill of Rights," by the ERIC Clearinghouse for Social Studies/Social Science Education, contains a bibliography and directory of national and state organiztions promoting teaching about the Constitution. It also contains sample lessons on the Bill of Rights, reprints of key historical documents, background papers on the subject and a Bill of Rights chronology. The guide is $15 per copy plus $2 for shipping and handling from Publications Manager, Social Studies Development Center, Indiana University, 2805 East 10th St., Suite 120, Bloomington, IN. 47408.

*The American Civil Liberties Union has a directory of briefing papers, books, pamphlets and posters on lawsuits that involved the Bill of Rights. The address is 132 West 43rd St., New York, NY 10036; telephone 212-944-9800, ext. 607.

* A catalogue of publications about the Bill of Rights is available from the American Historical Association at 400 A St. S.E., Washington , DC 20003; telephone 202-544-2422.

*"Right in History" available from National History Day, 11201 Euclid Ave., Cleveland, OH. 44106; telephone 216-421-8803.

BILL OF RIGHTS

Cases and Controversies

Student Material

Grades 8–12

Maine Law Related Education Program

University of Maine School of Law

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BILL OF RIGHTS: CASES AND CONTROVERSIES

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Deborah Donovan, Esq. and Teacher
Stephen Hayes, Esq.
Rick Joyce, Esq. and Teacher
Jim McKenna, Esq.
Surran Pyne, Esq.
Tim Robbins, Esq.
Elizabeth Scheffee, Esq.
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Nancy Ziegler, Esq.

Three teacher-lawyers were absolutely essential to the project from its outset to its end. Deb Donovan of Waynflete School, Rick Joyce of Morse High School and Jeff Shedd of Mr. Ararat School researched cases, did edits and summaries, wrote introductory sections and teaching strategies, and made the materials accessible to their colleagues in our Seminar and Workshop on the First Amendment and in our 1991 Summer Institute in Law-Related Education. In general, they never said no to a request for ideas, written words, or a meeting, and never said yes without putting the considerable full weight of their thoughts and experience behind it. As people who love the art they practice, they were inspiring. They were also a good time, as were Will, Ned and Daniel, offspring occassionally incorporated into our meetings.

The contributions of Pam Anderson and Mimi Marchev were no less essential. They, too, did case research, editing and writing, and they were instrumental in those last crucial steps which come under the general heading of pulling it all together. They also contributed greatly to conceptual discussions. Pam organized and edited the material for the teacher guide after the case materials were finished.

As the leader of the First Amendment Seminar and a major contributor to the followup Workshop, James Friedman, Professor of Law at the University of Maine School of Law, first brought the materials to real life. The teacher-participants in this two-part program, like those in all four of our Summer Institutes, found in Jim Friedman a model against which to measure and shape their own beliefs about and approaches to teaching. His sense of humor also didn't hurt.

The teacher-participants in our Seminar and Summer Institute tried out, looked over, commented on and otherwise helped to give shape to the curriculum materials.

And if in the beginning there were all these worthies, in the end there would have been nothing to show for their work had it not been for Anne Schaff and Virginia Wilder Cross. Anne organized, communicated and word processed throughout the project and its adjuncts, and kept smiling. Ginny, who approaches desktop publishing with the aplomb of an experienced lion tamer, designed and produced the materials in their final form.

The University of Maine School of Law, as home to the Law-Related Education Program, was home to this project as well. Former Dean Kinvin Wroth and current Dean Donald Zillman made a place for us by the fire.

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Kay Evans
Former Director
Maine Law-Related Education Program
Portland, Maine
December, 1991

A final acknowledgement is in order. Kay Evans, who has since left as Director, was the moving force in producing this Bill of Rights curriculum for Maine classrooms. The project was Kay's brainchild, and she guided, supported and energized the Work Group members and staff who produced these materials. She also did much of the writing and editing of the case materials. Without her creative energy, persistence and high standards the project would never have come to fruition.

This curriculum project is only one legacy of Kay's extraordinarily productive tenure as Director of the Law-Related Education Program. She created a program based on her belief that law is a rich source of content and method for education at every level. She put that belief into practice in all that she did, building a quality teacher training resource with high credibility among educators. Kay will be missed by her many friends among the teachers who have participated in her seminars, workshops and Summer Institutes, by her associates, and by all the educators and lawyers who have been touched by her vision for law-related education in Maine.

June, 1992

THE FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

- Amendment I, United States Constitution

All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no one shall be hurt, molested or restrained in his person, liberty or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship;... and no subordination nor preference of any one sect or denomination to another shall ever be established by law....

- Article I, Section 3, Maine Constitution

Every citizen may freely speak, write and publish his sentiments on any subject, being responsible for the abuse of this liberty; no laws shall be passed regulating or restraining the freedom of the press....

- Article I, Section 4, Maine Constitution

The people have a right at all times in an orderly and peaceable manner to assemble to consult upon the public good, to give instructions to their representatives, and to request, of either department of the government by petition or remonstrance, redress of their wrongs and grievances.

- Article 1, Section 15, Maine Constitution

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Case text in italics indicates that we have inserted our language in place of the Court's language, for ease in reading.

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... Indicates that portions of a sentence or paragraph have been omitted.

Introduction

The First Amendment includes many of the basic civil rights that we as Americans consider to be especially central in our lives. Most of us will never have a case presented to a grand jury, be threatened with "cruel and unusual punishment," or be confronted with a soldier demanding the exclusive use of our home. But the First Amendment applies to our daily lives, as we freely worship, or refuse to do so; converse and mingle openly with our families, friends, and colleagues; read a wide range of newspapers or magazines; or even write an indignant letter to the editor complaining of governmental misconduct.

As with the other "fundamental" rights protected in the Bill of Rights, initially only the Federal government was forbidden to tamper with the First Amendment's guarantees. Following the ratification of the Fourteenth Amendment in 1868, decisions of the United States Supreme Court laid down the rule that state governments, too, were bound to respect these rights. Maine's Constitution, adopted in 1820, had already recognized the same rights as those protected by the First Amendment.

Religious freedom was vital to the first English colonists. Religious persecution in England and the presence of the dominant Church of England had caused the settlement of many of the thirteen original colonies, including Massachusetts, Connecticut, Rhode Island, Pennsylvania, and Maryland. The First Amendment's two clauses dealing with religion reflect the colonists' concerns. Congress may neither "establish" a religion nor interfere with its "free exercise." Just what those terms actually mean has been hotly debated over the 200 years of the Bill of Rights. For example, the words "In God We Trust" appear on United States currency, and Congress and most state legislatures open each session with a prayer. However, the Supreme Court has forbidden prayer in classrooms, including a moment of silence. On the other hand, it recently held that students wishing to establish a Bible study group at school must be given the same rights as those in other extra-curricular organizations.

The English Magna Carta of 1215 and its companion, the Bill of Rights of 1689, established that everyone has the right to petition the Crown; the 1689 Bill of Rights also provided that there must be freedom of debate in Parliament. These ideas were incorporated into the United States Bill of Rights, together with the general protection for freedom of speech. This right, however, is not absolute; given a showing of urgent need, the Government may be justified in limiting it. One of the most famous examples of "unprotected speech" was that set forth by Justice Oliver Wendell Holmes, in the case of Schenk v. United States, 249 U.S. 47 (1919):

> ... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.

In general, speech, even speech that the majority of us abhor, is protected. The Supreme Court has more often than not ruled on behalf of the speaker against the government. Freedom of speech, with its connection to freedom of thought, may be our most highly valued "fundamental" right.

A free press, too, plays a fundamental role in our democracy, by providing a forum for public debate and discussion on issues of local, national, and international importance and by keeping citizens informed of these issues. A free press provides citizens with knowledge of diverse opinions upon which to make informed choices. Only with this knowledge can enlightened self-governance take place.

There is disagreement as to whether freedom of the press adds additional protection to that guaranteed by freedom of speech, but the Supreme Court has given newspapers protection beyond free speech. It has also held that "press" includes not only established newspapers, but also leaflets, circulars, and pamphlets - any published material that plays a role in the discussion of public affairs. Freedom of the press was of vital interest in 1791, as the government of King George III had punished both colonial and English newspapers for supporting American independence.

Freedom of assembly and petition were part of the basis of the American Revolution; one of the grievances in the Declaration of Independence against King George III was that "(o)ur repeated petitions have been answered only by repeated injury." The right of assembly, however, is limited to its peaceable purpose; convictions for conspiracy to commit crimes have been upheld, as have licensing requirements for parades and other public gatherings. As with all the other fundamental rights protected within the First Amendment, however, the government must show a pressing need before limiting the rights to assemble and to petition.

When Has the Government "Established" a Religion?

Evolution and Creationism

In most public schools, the theory of evolution is taught as part of biology. According to the theory, the earth has been around for millions of years, and the animals who inhabit the earth—including man—have evolved from lower forms of animals. What determines whether particular forms of animals survive, according to evolutionists, is whether the animals are well adapted, or fit, to their environment. Thus, evolutionary theory is often known by the phrase "survival of the fittest."

The teaching of evolution in public schools has led to many court battles. In the 1920's, a Tennessee teacher was prosecuted for teaching evolution. The name of the teacher was John Scopes, and the trial, which pitted two of America's most famous and brilliant lawyers against one another, became known as the "Scopes Monkey Trial." Why is such a fuss raised over the teaching of evolution? Primarily because some fundamentalist Christian groups, who believe in the literal truth of the Bible, maintain that the theory of evolution is contrary to their religious beliefs. The right of fundamentalists to disbelieve in evolutionary theory is protected, of course, by the First Amendment.

Additionally, some scientists themselves question the evolutionary theory. "Creationism" is the label given to the theory, supported by some fundamentalists and some scientists, that the earth has been around for a much shorter time than the evolutionists believe and that not all forms of animals evolved from lower forms.

In 1982, the Louisiana Legislature enacted a statute dealing with the teaching of evolutionary theory and creationism in the public schools. The title of the Act was the "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act." Louisiana's Act did not require the teaching of either evolutionary theory or creationism in the public schools . It did, however, require that, if one of the theories was taught, the other must also be taught. In other words, instruction in evolution was prohibited unless accompanied by instruction in "creation science" and vice versa. The Act defined both "evolution science" and "creation science" as "the scientific evidences for evolution or creation and inferences from those scientific evidences." The constitutionality of the Act under the Establishment Clause of the First Amendment was challenged by certain parents of Louisiana public school students.

Edwards v. Aguillard

482 U.S. 578 (1987)

BRENNAN, J., joined by Justices Marshall, Stevens and Blackmun. Justices Powell, O'Connor, and White concurred separately. Chief Justice Rehnquist and Justice Scalia dissented.

***

> ...The Court has applied a three-pronged test to determine whether legislation is consistent with or violates the Establishment Cause. First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion... .
>
> ...Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary... .
>
> The first part of the test we apply is to determine the purpose behind the law. Here, the Act's stated purpose is to protect academic freedom.... Even if "academic freedom" is read to mean

"teaching all of the evidence" with respect to the origin of human beings, the Act does not further this purpose. ...

(The Court notes that Louisiana teachers are already permitted to teach any scientific concept that's based on fact.)

(The Court also finds the Act does not simply require fairness.) It contains a discriminatory preference for the teaching of creation science and against the teaching of evolution. For example, while requiring that curriculum guides be developed for creation science, the Act says nothing of comparable guides for evolution....The Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting evolution by counterbalancing its teaching at every turn with the teaching of creationism... .

(Court reviews historic evidence of antagonism between certain religious beliefs and evolution.) These same historic...antagonisms...are present in this case. The preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind... . *The term "creation science" implies that* a creator was responsible for the universe and everything in it.

In this case, the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint. Out of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects... . The Creationism Act is designed either to promote the theory of creation science which embodies a particular religious tenet by requiring that creation science be taught whenever evolution is taught or to prohibit the teaching of a scientific theory disfavored by certain religious sects by forbidding the teaching of evolution when creation science is not also taught. ...

We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught... . Teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction. But because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause.

POWELL, J., concurring.

***

While the meaning and scope of the First Amendment must be read in light of its history and the evils it was designed forever to suppress,... this Court has also recognized that this Nation's history has not been one of entirely sanitized separation between Church and State.... The fact that the Founding Fathers believed devotedly that there was a God and that the inalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.... The Court...has recognized that these references to our religious heritage are constitutionally acceptable.

This law is unconstitutional because the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma... . Accordingly, I concur in the opinion of the Court and its judgment that the Balanced Treatment Act violates the Establishment Clause of the Constitution.

SCALIA, J., joined by Chief Justice Rehnquist, dissenting.

...The Louisiana legislators who passed the...Act...each of whom had sworn to support the

Constitution, were well aware of the potential Establishment Clause problems and considered that aspect of the legislation with great care... . They approved the Act overwhelmingly and specifically *articulated* the secular purpose they meant it to serve. Although the record contains abundant evidence of the sincerity of that purpose...the Court today holds...that the members of the Louisiana Legislature knowingly violated their oaths and then lied about it.

(Justice Scalia then explains that it is possible the statute is unconstitutional, but it is too early to tell until it is applied and interpreted by the Louisiana courts). At present, we can only guess at *the Act's* meaning. The parties *themselves* are sharply divided over what creation science consists of. *The supporters of the Act* insist that it is a collection of educationally valuable scientific data that has been censored from classrooms by an embarrassed scientific establishment. *The opponents of the Act* insist it is not science at all but thinly veiled religious doctrine... . *Until the statute is applied and interpreted,* we must assume that the Balanced Treatment Act does not require the presentation of religious doctrine... .

The purpose forbidden *by prior cases of the Court* is the purpose to advance religion....Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved... .

Moreover, the fact that creation science coincides with the beliefs of certain religions, a fact upon which the majority relies heavily, does not itself justify invalidation of the Act.

(The dissent then argues that the purpose of the Establishment Clause is to establish neutrality toward religion). If the Louisiana Legislature sincerely believed that the State's science teachers were being hostile to religion *by refusing to teach facts that supported creation science*...it *should be free to* act to eliminate that hostility... .

...The Balanced Treatment Act did not fly through the Louisiana Legislature on wings of fundamentalist religious fervor—which would be unlikely, in any event, since only a small minority of the State's citizens belong to fundamentalist religious denominations. ...

(The dissent then reviews testimony before the Louisiana Legislature by recognized scientists supporting the scientific legitimacy of creation science). Striking down a law approved by the democratically elected representatives of the people is no minor matter. ...The *Louisiana* legislature wanted to ensure that students would be free to decide for themselves how life began, based upon a fair and balanced presentation of the scientific evidence... .

***

I am astonished by the Court's unprecedented readiness to reach *a conclusion that the Act had an exclusively religious purpose*... . I can only attribute *the Court's conclusion* to an intellectual predisposition created by the facts and the legend of *the Scopes Monkey Trial*...an instinctive reaction that any governmentally imposed requirements bearing upon the teaching of evolution must be a manifestation of Christian fundamentalist repression. In this case, however, it seems to me the Court's position is the repressive one. The people of Louisiana, including those who are Christian fundamentalists, are quite entitled, as a secular matter, to have whatever scientific evidence there may be against evolution presented in their schools, just as Mr. Scopes was entitled to present whatever scientific evidence there was for it. Perhaps what the Louisiana Legislature has done is unconstitutional because there is no such evidence, and the scheme they have established will amount to no more than a presentation of the Book of Genesis. *But it is too early to reach that conclusion until the law is implemented and interpreted.*

When Has the Government "Established" a Religion?

Prayer at Public School Graduations

Graduations almost always include speeches, diplomas, tears and cheers...and prayers.

Questions of governmental approval and constitutional restraint have never been raised about prayers of thanks uttered silently by graduates and/or their exhausted parents. But what about the traditional invocation and benediction given by a local priest, minister or rabbi, or by a member of the school administration or faculty? In the following case, an eighth grade student graduating from middle school in Providence, Rhode Island, objected to the nondenominational prayers given by a local rabbi at her graduation, and asked to have the practice halted at all future graduations. Following are excerpts from the court decisions in the case, the first by the trial court and the second by the Circuit Court of Appeals. Other Circuit Courts of Appeal have decided similar cases differently. Because of the disagreement among Circuit Courts, the case will be argued and decided in the 1991-92 session of the United States Supreme Court.

Weisman v. Lee

728 F.Supp. 68 (D.R.I. 1990)

BOYLE, C.J.

The issue presented is whether a benediction or invocation which invokes a deity delivered by clergy at an annual public school graduation ceremony violates the First Amendment of the United States Constitution. This Court finds that because a deity is invoked, the practice is unconstitutional under the Establishment Clause of the First Amendment....

The Providence school committee and the Superintendent permit public school principals to include invocations and benedictions, delivered by clergy, in the graduation and promotion ceremonies... . The practice has...been followed for many years.

***

> *Since 1962*, the Supreme Court as steadfastly required that the schoolchildren of America not be compelled, coerced, or subtly pressured to engage in activities whose predominant purpose was to advance one set of religious beliefs over another, or to prefer a set of religious beliefs over no religion at all. God has been ruled out of public education as an instrument of inspiration or consolation.... (T)he Establishment Clause of the First Amendment was intended to prevent a State from becoming involved in leading its citizens, however young, in appeals to or adoration of a deity.

***

> In this case, the benediction and invocation advance religion by creating an identification of school with a deity, and therefore religion... . While the fact that graduation is a special occasion distinguishes this school day from all others, the uniqueness of the day could highlight the particular effect that the benediction and invocation may have on the students... . It is the union of prayer, school, and important occasion that creates an identification of religion with the school function.
>
> ...(T)he Providence School Committee has in effect endorsed religion in general by authorizing an appeal to a deity in public school graduations. The invocations and benedictions convey a tacit preference for some religions, or for religion in general over no religion at all. Schoolchildren who are not members of the religions sponsored, or children whose families are non-believers, may feel as though the school and government prefer beliefs other than their own.

***

On every other school day, at every other school function, the Establishment Clause prohibits school-sponsored prayer. If the students cannot be led in prayer on all of those other days, prayer on graduation day is also inappropriate....

It is necessary to explain what this decision does not do. *Voluntary private prayer by children is appropriate at any time.* (N)othing in this decision prevents a cleric of any denomination or anyone else from giving a secular inspirational message at the opening and closing of the graduation ceremonies... . (I)f Rabbi Gutterman had given the exact same invocation as he delivered at the Bishop Middle School on June 20, 1989 with one change - God would be left out - the Establishment Clause would not be implicated. The plaintiff here is contesting only an invocation or benediction which invokes a deity or praise of a God.

Weisman v. Lee

908 F.2d 1090 (1st Cir. 1990)

TORRUELLA, C.J.

This is an appeal from the United States District Court for the District of Rhode Island... . We are in agreement with the...opinion of the district court and see no reason to elaborate further. Affirmed.

BOWNES, Senior Circuit Judge, concurring.

...Unlike other political documents, such as the Declaration of Independence, the Constitution is completely secular, neither invoking nor referring to "God" or any deity. The First Amendment prohibits "laws respecting the establishment of religion."

***

Although the Court may have sent confusing signals on the theoretical or historical underpinnings of the Establishment Clause, it has strictly and consistently interpreted the prohibitions of the Establishment Clause in cases involving prayer in the public schools.... The appellants argue that this case is not controlled by the school prayer cases because graduation attendance is voluntary, graduation sometimes takes place off-campus, and it only occurs once a year... . Because graduation represents the culmination of years of schooling and is the school's final word to the students, the prayer is highlighted and takes on special significance at graduation.

***

The district court...stated that if "God" had been left out of the benediction...the Establishment Clause would not be implicated. This, in my opinion, is too literal and narrow an interpretation of prayer and what is acceptable under the Constitution. The Constitution prohibits prayer in public schools and not merely reference to a deity... . A benediction or invocation offends the First Amendment even if the words of the invocation or benediction are somehow manipulated so that a deity is not mentioned... . (T)he direct reference to a deity should not be the constitutional touchstone for our analysis.

CAMPBELL, Circuit Judge, dissenting.

I am *not* amenable to Judge Bownes' reasoning. His seems to me an extreme position, especially his view that a benediction would offend the First Amendment even if a deity were not even mentioned....

By *banning invocations* we deprive people of an uplifting message that seems especially suitable for a rite of passage like a graduation, where those present wish to give deeply felt thanks. Our First Amendment jurisprudence normally protects speech rather than suppressing it.... So what good...is accomplished by preventing an invocation like this? There is a tradition of such remarks going back to the Founders.

...I think *that invocations and benedictions are appropriate* on public, ceremonial occasions, provided authorities have a well-defined program for ensuring...that persons representative of a wide range of beliefs and ethical systems are invited to give the invocation. The rule should make provision not only for representatives of the Judeo-Christian religions to give the invocation, but for representatives of other religions and of nonreligious ethical philosophies to do so... . In brief, I think the First Amendment values are more richly and satisfactorily served by inclusiveness than by barring altogether a practice most people wish to have preserved.

When Has The Government "Established" a Religion?

The Case of the Christmas Creche

Christmas is a national holiday, but it is also a Christian holiday. This raises a First Amendment question: how far can the government go in officially joining in the celebration of Christmas? On the one hand, the majority of people in America probably celebrate Christmas. On the other, the First Amendment must prevent government favoritism towards any single religion.

Towns and cities frequently put up lights and other decorations in celebration of Christmas. Some towns have been putting up Christmas creches—models of the manger scene with Mary, Joseph, Jesus, the shepherds and animals—for many years. Pawtucket, Rhode Island was one of the cities with a custom of putting a creche in the public park. In 1984, the case of the Pawtucket creche went all the way to the United States Supreme Court. In a close 5-4 decision, the Supreme Court ruled the Pawtucket creche was not unconstitutional.

Lynch, Mayor of Pawtucket, v. Donnelly

465 U.S. 668 (1984)

BURGER, C.J., joined by Justices White, Powell, and Rehnquist. Justice O'Connor concurred separately. Justices Brennan, Marshall, Blackmun, and Stevens dissented.

> Each year, in cooperation with the downtown retail merchants' association, the city of Pawtucket, R.I., erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the Nation...during the Christmas season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here. ...
>
> The creche, which has been included in the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals, all ranging in height from 5" to 5'. In 1973, when the present creche was acquired, it cost the city $1,365; it now is valued at $200. The erection and dismantling of the creche costs the city about $20 per year; nominal expenses are incurred in lighting the creche. No money has been expended on its maintenance for the past 10 years.
>
> ...The purpose of the Establishment and Free Exercise Clauses of the First Amendment is "to prevent, as far as possible, the intrusion of either *the church or the state* into the precincts of the other." At the same time..."total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable."
>
> ***
>
> The Court's interpretation of the Establishment Clause has comported with what history reveals was the understanding of *what the Clause meant when it was adopted*....In the very week that Congress approved the Establishment Clause as part of the Bill of Rights...it enacted legislation providing for paid Chaplains for the House and Senate. *The practice of offering daily prayers in Congress* has continued for nearly two centuries.... President Washington...proclaimed Thanksgiving, with all its religious overtones, a day of national celebration and Congress made

it a National Holiday more than a century ago... . *Our national motto* is "In God We Trust..." *The Pledge of Allegiance refers to the United States as "one nation under God."* ...Our history is pervaded by expressions of religious beliefs... . Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none.

This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause... . Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—the Court *does not invalidate such conduct or statutes unless* it establishes a religion or religious faith, or tends to do so.

The *Pawtucket Christmas* display is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular *non-religious* purposes....

Our prior decisions plainly contemplate that on occasion some advancement of religion will result from governmental action... . Here, whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the creche is no more an advancement or endorsement of religion than *the recognition of Christmas as a holiday, the paying of Congressional chaplains, or the other examples cited by the Court.*

To forbid the use of this one passive symbol—the creche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings.

Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed.

O'CONNOR, J., concurring.

***

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions... . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message....

***

Political divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion....

The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the creche. To answer that question, we must examine what Pawtucket intended to communicate in displaying the creche, and what message the city's display actually conveyed....

Applying that formulation to this case, I would find that Pawtucket did not intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions.

The evident purpose of including the creche in the larger display was not promotion of the religious content of the creche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.

BRENNAN, J., dissenting, joined by Justices Blackmun, Marshall, and Stevens.

Our prior decisions in my view compel the holding that Pawtucket's inclusion of a life-sized display depicting the biblical description of the birth of Christ as part of its annual Christmas celebration is unconstitutional. Nothing in the history of such practices or the setting in which the city's creche is presented obscures or diminishes the plain fact that Pawtucket's action amounts to an impermissible governmental endorsement of a particular faith.

After reviewing the Court's opinion, I am convinced that this case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems so familiar and agreeable.

(Justice Brennan reviews evidence about whether the purpose of including the creche in the Christmas display had a basically religious or secular purpose.) According to the town of Pawtucket, it sought...only to participate in the celebration of a national holiday and to attract people to the downtown area in order to promote pre-Christmas retail sales and to help engender the spirit of goodwill and neighborliness commonly associated with the Christmas season...But the city's interest in celebrating the holiday and in promoting both retail sales and goodwill are fully served by the elaborate display of Santa Claus, reindeer, and wishing wells that are already a part of Pawtucket's annual Christmas display... . Plainly, the city and its leaders understood that the inclusion of the creche in its display would serve the wholly religious purpose of "keeping Christ in Christmas."

Including the creche in the Christmas display can only mean that the prestige of the government has been conferred on the beliefs associated with the creche. ...The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not...worthy of public recognition nor entitled to public support.

The Court apparently believes that once it finds that the designation of Christmas as a public holiday is constitutionally acceptable it is then free to conclude that virtually every form of governmental association with the celebration of the holiday is also constitutional....*But* to say that government may recognize a holiday's traditional, secular elements of gift-giving, public festivities, and community spirit, does not mean that government may indiscriminately embrace the distinctively sectarian aspects of the holiday. ...When government decides to recognize Christmas Day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to spend time visiting with their families, attending religious services, and perhaps enjoying some respite from preholiday activities....But when *government* participates in or appears to endorse the distinctively religious elements of this otherwise secular event, *it violates* First Amendment freedoms. *(Justice Brennan contrasts the creche with, for example, allowing the Bible to be read in school for purely literary purposes.)*

Although in some cases it may be permissible to have some official "acknowledgment" of religion, if government is to remain...neutral in matters of religious conscience, as our Constitution requires, then it must avoid those overly broad acknowledgments of religious practices that may imply governmental favoritism toward one set of religious beliefs.

I would suggest that such practices as the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance are...protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.

*H*istorical acceptance of a particular practice alone is never sufficient to justify a challenged governmental action... . Attention to the details of history should not blind us to the cardinal purposes of the Establishment Clause, nor limit our central inquiry in these cases—whether the challenged practices "threaten those consequences which the Framers deeply feared."

Even if we are to look at history, the widespread celebration of Christmas did not emerge in its present form until well into the 19th century. *Justice Brennan reviews evidence that until the 1800's, different Christian sects in America had very different attitudes toward the public celebration of Christmas. Christmas did not receive widespread recognition as a legal holiday until the mid -1800's. In light of this evidence,* our prior decisions which rely upon concrete, specific historical evidence to support a particular practice simply have no bearing on the question presented in this case.

The city of Pawtucket's action should be recognized for what it is: a coercive, though perhaps small, step toward establishing the sectarian preferences of the majority at the expense of the minority... .

The Free Exercise Clause

Taking Drugs For God

The Free Exercise clause of the First Amendment protects the right of all of us to exercise our religious beliefs without restriction by the government. But what if our religious beliefs demand that we do things that violate the laws of the land? Does the Free Exercise Clause mean that the laws must take a back seat to individual citizens' religious beliefs?

Alfred A. Smith is a Native American. He belongs to a church known as the Native American Church. One of the sacraments of the Native American Church involves the ingestion of a hallucinogenic drug called peyote. Possession of peyote is a felony crime under Oregon law.

Mr. Smith was an employee at a drug rehabilitation center. That center prohibited use of illegal drugs. Either through drug testing or some other means, the center learned that Mr. Smith had ingested peyote in the exercise of his religious beliefs. He was fired.

All states in this country have laws that are designed to provide short-term financial support to workers who have lost their jobs. In Oregon, however, the law provided that no compensation would be paid if an employee were fired for "misconduct." Since use of peyote violated Oregon law, the state denied Mr. Smith's application for unemployment benefits, because it ruled he had been fired for misconduct. Mr. Smith sued. He claimed that he was entitled to benefits because he was merely exercising his religious beliefs.

Employment Division, Department of Human Resources of Oregon, v. Smith

58 U.S.L.W. 4433 (1990)

SCALIA, J., joined by Rehnquist, White, Stevens, and Kennedy. O'Connor concurred separately. Blackmun, Brennan, and Marshall dissented.

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(The Court notes that the Free Exercise clause would prohibit a law which forbade drug use only as part of a religious ceremony.) Mr. Smith *contends, however* that *his* religious motivation for using peyote places *him* beyond the reach of a criminal law that is not specifically directed at *his* religious practice. ...

...We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate... . *We have previously* rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices... . Can a man excuse his practices contrary to the law because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land... . "

(The majority opinion then argues that it makes no difference that Mr. Smith is not being prosecuted under the criminal law. The Court says that unemployment benefits may be denied where there is a violation of a criminal law, and that there is no need to balance the state's interest in denial of benefits against the burden placed on the free exercise of religion.) ...The rule *Mr. Smith and the dissent* favor would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service...to the payment of taxes...*to* laws providing for equality of opportunity for the races. ...The First Amendment's protection of religious liberty does not require this.

...*Leaving* accommodation of *religious beliefs* to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

O'CONNOR, J., concurring.

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...A law that prohibits certain conduct—conduct that happens to be an act of worship for someone—...does prohibit that person's free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion.... .

This does not mean that a person has an absolute right to engage in religious conduct. But any state interference with one's exercise of religious belief must be justified by a compelling state interest.

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...The Court today suggests that the disfavoring of minority religions is an "unavoidable consequence" under our system of government and that accommodation of such religions must be left to the political process... . In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility.

(In deciding whether Oregon had a compelling interest to require its drug laws to apply uniformly to everybody, without exception for religious conduct, the concurring opinion concludes that uniform enforcement of drug laws is a compelling state interest.)

BLACKMUN, J., joined by Justices Brennan and Marshall, dissenting.

(The dissent agrees with Justice O'Connor's reasoning, but does not believe the State has a compelling interest in demanding uniformity of its drug laws where they interfere with religion.)

...The State cannot plausibly assert that unbending application of a criminal prohibition is essential...if it does not, in fact, attempt to enforce the *law against everybody*. In this case, *Oregon has made no effort to enforce its anti-peyote laws against Mr. Smith or other members of the Native American Church.*

Moreover, the decisions of other courts cast doubt on the State's assumption that religious use of peyote is harmful. ...The carefully *controlled* ritual context in which *Mr. Smith* used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs....Not only does the Church's doctrine forbid nonreligious use of peyote; it also generally advocates self-reliance, familial responsibility, and abstinence from alcohol.

The State expressed a fear that, if peyote use is permitted in a religious context, other people will claim their use of drugs was part of their religion. But the dissent explains that almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions. *(The dissent then reasons that claims of religious use of marijuana or heroin, for example, might be prohibited because of the size of their contribution to the national drug problem.)*

What is Speech? When is it Protected?

Students' Rights of Expression in School

There are times when rights guaranteed by the Bill of Rights give way to other legitimate government concerns. And not all guaranteed rights are available to all persons at all times. Children have traditionally been granted fewer rights, especially when under the control of their parents. And, under the doctrine of "in loco parentis" (Latin for "in the place of the parent"), schools assumed the rights of parents during the school day. However, does that mean that students have no rights? In 1965, two students were suspended from school for expressing their views on the Vietnam War. For the first time, the Supreme Court dealt directly with the issue of the First Amendment rights of teachers and students in school.

Tinker v. Des Moines School District

393 US 503 (1969)

FORTAS, J., joined by Warren, C.J., and Justices Brennan, Douglas, and Marshall. Justices White and Stewart concurred. Justices Black and Harlan dissented.

Petitioner John F. Tinker, 15 years old,...attended high school in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13 year old student in junior high school.

In December 1965 a group of adults and students in Des Moines, members of the Society of Friends, held a meeting... . *They* determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Years Eve. ...

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14 they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Petitioners were aware of the policy that the school authorities adopted.

On December 16th and 17th Mary Beth and John wore black armbands to school. They were sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired - that is, until after New Years Day.

The Tinkers sued, claiming a violation of their First Amendment right to freedom of speech. The District Court upheld the constitutionality of the school authorities' action on the ground that it was reasonable to prevent disturbance of school discipline. The Court of Appeals affirmed without opinion.

•••

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech"....

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. ...On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental Constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of school authorities.

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The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary, First Amendment rights, akin to "pure speech."

There is here no evidence whatever of petitioners' interference...with the school's work or of collision with the rights of other students to be secure and to be let alone... . There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system...fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken...may start an argument or cause a disturbance. But our Constitution says we must take this risk... . In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was based on something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint....

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It is also relevant that the schools did not...prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these... . Clearly the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible. In our system, state-operated schools may not be enclaves of totalitarianism... . And a student's rights do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field,...he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfering with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. But conduct...which materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

...The record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders...in fact occurred. In the circumstances, our Constitution does not permit officials of the state to deny their forms of expression....

An Incendiary First Amendment Issue

Flag Burning As Free Expression

Can you "say" something without using words? Of course! Each of us is used to identifying people's opinions by means of bumper stickers, lapel buttons, and even hand gestures. This "symbolic speech" is given the same protection by the First Amendment's freedom of expression as are spoken and written speech. The First Amendment, however, is not absolute — the government is allowed to limit the right to freedom of expression in certain very specific instances. For example, obscenity is not protected. National security is another exception, as are libel and slander ("defamation"), and so-called "fighting words."

In the following case, a Vietnam veteran burned an American flag to demonstrate his dislike of Reagan Administration policies. He was arrested and charged with committing a crime under Texas law. (The law said: "A person commits an offense if he intentionally or knowingly desecrates...a state or national flag.... '(D)esecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.") The Supreme Court was asked to decide whether his actions were the equivalent of speech and, if so, if they fell under an exception to freedom of expression.

Texas v. Johnson
491 U.S. 397 (1989)

BRENNAN, J., joined by Justices Marshall, Blackmun, and Scalia. Justice Kennedy concurred separately. Chief Justice Rehnquist and Justices Stevens, White, and O'Connor dissented.

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

During the Republican National Convention in Dallas in 1984, Johnson and other demonstrators marched, made speeches, and held a "die-in" against Reagan administration policies. An American flag was ripped from a flag pole and given to Johnson, who soaked it in kerosene and set it on fire. While the flag burned, the protesters chanted, "America the red, white, and blue, we spit on you." *Afterwards, someone took the remains of the flag and buried them in his backyard. No one was hurt or threatened, although many onlookers were offended by what Johnson did.*

...The First Amendment literally forbids the abridgement of "speech," but we have long recognized that its protection does not end at the spoken or written word.... In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." ...Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag..., saluting the flag..., and displaying a red flag..., we have held, all may find shelter under the First Amendment.

...Johnson burned an American flag as part - indeed as the culmination - of a political demonstration.... At his trial, Johnson explained his reasons for burning the flag as follows: "The American flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a juxtaposition. We had new patriotism and no patriotism."

The government may have a legitimate interest that allows it to limit such speech. ...Texas offers two separate interests to justify this conviction: preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression. *Here, no riots took place. Johnson's conduct did not amount to "fighting words."* ...No reasonable onlooker *would have considered his actions* as a direct personal insult *and an invitation to fight*.

...The Texas law is not aimed at protecting...the flag in all circumstances, *only when damaging it* would cause serious offense to others. ...According to Texas, if one physically treats the flag in a way that would tend to cast doubt on *national unity*, the message...is a harmful one and therefore may be prohibited.

If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. We have not recognized an exception to this principle even where our flag is involved... . Texas attempts to convince us that even if its interest in preserving the flag's symbolic role does not allow it to prohibit words or expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. *But if we agree with Texas, then the flag could only be used to express one, positive, viewpoint.* ...Could the Government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? ... . To do so, we would be forced to impose our own political preferences on the citizenry, *as* the First Amendment forbids us to do.

...To say that the Government has an interest in encouraging proper treatment of the flag is not to say that it may criminally punish a person for burning a flag as a means of political protest.... The way to preserve the flag's special role is not to punish those who feel differently... . It is to persuade them that they are wrong.... We can imagine no more appropriate response to burning a flag than waving one's own... . We do not consecrate the flag by punishing its desecration, for in doing so we *would* dilute the freedom that this cherished emblem represents.

KENNEDY, J. concurring:

...It is poignant but fundamental that the flag protects those who hold it in contempt.

REHNQUIST, C.J., joined by Justices White and O'Connor, dissenting. Justice Stevens dissented separately.

For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here. *(The Chief Justice quotes at length from Emerson's "Concord Hymn," Key's "The Star Spangled Banner," and Whittier's "Barbara Frietchie.")*.... The flag symbolizes the Nation in peace as well as in war... . No other American symbol has been as universally honored as the flag. *Federal law, as well as all but two states (Alaska and Wyoming) prohibit the burning of the flag.*

...The right of free speech is not absolute at all times and under all circumstances.... *Laws may prohibit* the lewd and the obscene, the profane, the libelous, and the insulting or 'fighting' words.

...*H*ere Johnson was free to make any verbal denunciation of the flag that he wished.... *His* public burning of the flag obviously did convey Johnson's bitter dislike of this country, *but it was unnecessary. He still had* a full panoply of other symbols *that he could have destroyed* and every conceivable form of verbal expression to express his deep disapproval of national policy.

...Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people, whether it be murder, embezzlement, pollution, or flag-burning... . The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight.

Justice STEVENS, dissenting.

A country's flag is a symbol of more than nationhood and national unity. It also signifies the ideas that characterize its society. The message conveyed by some flags - the swastika, for example - may *outlast the government they represent.* So it is with the American flag. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of goodwill for other peoples who share our aspirations.

Here, respondent was prosecuted because of the method he chose to express his dissatisfaction with *the policies of the Reagan administration.* Had he chosen to spray paint...on the Lincoln Memorial, *the Government could forbid or prosecute his expression.* ....The same interest supports a prohibition on the desecration of the American flag.

What is Speech? When is it Protected?

Flag Burning As Free Expression, Part II

After the Supreme Court's decision in Texas v. Johnson, Congress passed, and President Bush signed, the Flag Protection Act of 1989, which declared that: "Anyone who knowingly mutilates, defaces, burns, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both." Shortly thereafter, people doing just that were arrested in Washington, D.C. and Seattle, Washington. Everyone arrested asked the courts to dismiss their cases on the grounds that the Flag Protection Act violated the First Amendment; District Courts in both Washington State and the District of Columbia did dismiss. The United States Supreme Court, on appeals by the government, ruled by the same 5-to-4 majority and less than a year after deciding Texas v. Johnson, that the Flag Protection Act of 1989 was an unconstitutional restriction on free expression.

United States v. Eichman

496 U.S. 287 (1990)

BRENNAN, J., joined by Justices Marshall, Blackmun, Scalia, and Kennedy. STEVENS, J., dissented, joined by Chief Justice Rehnquist and Justices White and O'Connor.

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The Government concedes in this case, as it must, that appellees' flag-burning constituted expressive conduct..., but invites us to reconsider our rejection in Johnson of the claim that flag-burning as a mode of expression, like obscenity or "fighting words," does not enjoy the full protection of the First Amendment... . This we decline to do... .

The Government contends that the Flag Protection Act is constitutional because, unlike the statute addressed in Johnson, the Act does not target expressive conduct on the basis of the content of its message. The Government asserts an interest in protecting the physical integrity of the flag under all circumstances, in order to safeguard the flag's identity "as the unique and unalloyed symbol of the Nation."...

Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted interest is "related to the suppression of free expression"...and concerned with the content of such expression. The Government's interest in protecting the physical integrity of a privately owned flag rests upon a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals...and is implicated only when a person's treatment of the flag communicates a message to others that is inconsistent with those ideals.

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...We decline the Government's invitation to reassess this conclusion in light of Congress' recent recognition of a purported "national consensus" favoring a prohibition on flag-burning. Even assuming such a consensus exists, any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment.

...Government may create national symbols, promote them, and encourage their respectful treatment. But the Flag Protection Act goes well beyond this by criminally proscribing expressive conduct because of its likely communicative impact.

...Punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering. The judgments are Affirmed.

STEVENS, J., joined by Chief Justice Rehnquist, and Justices White and O'Connor, dissenting.

The Court's opinion ends where proper analysis of the issue should begin. Of course "the Government may not prohibit the expression of an idea, simply because society finds the idea itself offensive or disagreeable." None of us disagrees with that proposition. But it is equally well settled that certain methods of expression may be prohibited if (a) the prohibition is supported by a legitimate societal interest that is unrelated to suppression of the ideas the speaker desires to express; (b) the prohibition does not entail any interference with the speaker's freedom to express those ideas by other means; and (c) the interest in allowing the speaker complete freedom of choice among alternative methods of expression is less important than the societal interest suggesting the prohibition.

...The first question the Court should consider is whether the interest in preserving the value of that symbol is unrelated to suppression of the ideas that flag burners are trying to express... . The Government's legitimate interest in preserving the symbolic value of the flag is, however, essentially the same regardless of which of many different ideas may have motivated a particular act of flag burning.

...Thus, the Government may - indeed, it should - protect the symbolic value of the flag without regard to the specific content of the flag burners' speech. The prosecution in this case does not depend upon the object of the defendants' protest. It is, moreover, equally clear that the prohibition does not entail any interference with the speaker's freedom to express his or her ideas by other means....

This case, therefore, comes down to a question of judgment. Does the admittedly important interest in allowing every speaker to choose the method of expressing his or her ideas that he or she deems most effective and appropriate outweigh the societal interest in preserving the symbolic value of the flag?

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The symbolic value of the American flag is not the same today as it was yesterday... . Moreover, the integrity of the symbol has been compromised by those leaders who seem to advocate compulsory worship of the flag even by individuals whom it offends, or who seem to manipulate the symbol of national purpose into a pretext for partisan dispute about meaner ends. ...Simply dissenting without opinion would not honestly reflect my considered judgment concerning the relative importance of the conflicting interests that are at stake.

Accordingly, I respectfully dissent.

The First Amendment and Threats of Violence

Tolerance and Bombs in Bangor

In 1984, three Bangor high school students brutally murdered a Bangor homosexual. News of the murder sent shock waves throughout Maine and raised fears of anti-homosexual violence in Maine.

To combat these fears, David Solmitz, a teacher at Madison High School, began in the fall of 1984 to plan an all-day school activity known as Tolerance Day. Before Tolerance Day was held, it was canceled by the School Committee in charge of Madison High School. Solmitz and others who desired Tolerance Day to go forward sued the school district based on allegations of First Amendment violations.

Solmitz v. Maine School Administrative District No. 59

495 A.2d 812 (Me. 1985)

McKUSICK, C.J., joined by Justices Nichols, Roberts, Violette, Glassman, and Scolnick. There was no dissent.

> ...Tolerance Day, as the program became known, was designed to bring to the school representatives of some dozen different groups who have experienced prejudice in society. The program, to begin with a school-wide assembly, would replace scheduled classes throughout the school day on Friday, January 25, 1985.
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> On January 14, Solmitz met with the school's principal...to discuss *Tolerance Day.* At that meeting, the principal instructed Solmitz that he should not invite a homosexual to speak at Tolerance Day. *After further discussions, a compromise was reached whereby an assembly on prejudice in general would be held for all students. The assembly would be followed by mini-programs throughout the day where students could, if they chose, listen to the views of members of various minorities, including a homosexual. The compromise was approved by the principal.*
>
> ...News of the proposed *Tolerance Day* appeared in the local papers on Saturday morning, January 19, and during the weekend school administrators and school board members received fifty or more telephone calls and visits from people critical of *the proposed participation of Dale McCormick, the homosexual participant.* Some callers suggested that picketing might occur on the day of the program, and some parents threatened to keep their children out of school, or to attend school themselves to monitor *Tolerance Day.* A few of the phone calls warned the Board to expect bomb threats against the school and sabotaging of the school furnace if the program were held. *Based on the complaints and implied threats, the School Committee canceled Tolerance Day.*
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> ***
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> When the *School Committee* canceled the proposed Tolerance Day...it acted within its broad power to manage the curriculum of the Madison schools. Although we wholeheartedly endorse the statement of the United States Supreme Court that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate...," local school boards have broad discretion in the management of school affairs...
>
> *There is no violation of the rights of Mr. Solmitz.* Solmitz...does not...contend that the Board's veto infringed in any way upon his right to teach his assigned courses as he deemed appropriate, or to express himself freely on tolerance, prejudice against homosexuals, or any other subject. *However, the First Amendment does* not permit a teacher to insist upon a given curriculum for the whole school where he teaches.

The Board did not act out of any desire to suppress the idea of toleration of homosexuals. They voted to cancel the program because they feared that holding Tolerance Day would result in a serious disruption of the educational process at Madison High School. ...Plaintiffs urge that we overrule the trial court and find on our own that the true motive that prompted the Board to cancel Tolerance Day was that of the townsfolk who were opposed to having a homosexual appear at the school. We decline to take the novel step of declaring that a permissible decision of elected officials is infected with the invidious motives of their constituents. ...

...Even in cases where first amendment rights are directly implicated, a school board may act to restrict protected speech or conduct that materially disrupts classwork or involves substantial disorder. ...Surely then, in the present case the Board could permissibly veto a teacher's proposed addition to the curriculum that threatened to force the entire school to suffer a lost day educationally. This court cannot fault the decision of the Board in the face of likely bomb threats, a threatened sabotage of the school's heating plant in the middle of the Maine winter, and the numerous parents expected to keep their children at home or to picket the school on Tolerance Day.

...Students have no right to demand a curriculum of their own choice... .

...We are unable to hold that the Board acted to suppress a point of view to which its members were opposed *that is, toleration of homosexuals.* The Board canceled the entire program in the face of threats of disruptive activity by some members of the community. ...

Foul Language and The First Amendment

Book Banning in Baileyville

Your school undoubtedly has a school library. You might think most of the books in the school library are pretty tame stuff, and you might be right. But you might also be wrong. In 1971, the Woodland High School Library purchased 365 Days by Ronald J. Glasser. 365 Days is a book about the Vietnam war told in the words of some of the soldiers who fought in it. War in the jungles of Vietnam with a bunch of young, single males is not a great place for improving your vocabulary, and sometimes soldiers' language is pretty down and dirty. Since 365 Days is told in the words of the soldiers, it contains some pretty strong soldierese.

In 1981, Jane Davenport ("Jane" is not her real name; the Court doesn't give her name) was a 15-year old who attended Woodland. She went to the library and checked out 365 Days. Her mother, Mary Davenport, got word through the grapevine of the kind of language contained in the book and protested to the school librarian, the principal, and eventually the Baileyville School Committee which was in charge of running the school. The School Committee ordered the book removed from the shelves of the school library and even prohibited its possession altogether in Woodland School.

After the School Committee banned 365 Days, it decided it should have a formal policy which dealt with the problem of complaints from parents about books in the school. After several meetings, it passed a policy known as the Baileyville School Department Challenged Material Policy. Basically, under the policy, a review committee was set up consisting of school administrators, students, staff members and a member of the public. That committee was to be responsible for reviewing all materials which were challenged by parents. The Challenged Materials Policy set up a whole list of things a Committee should consider in reviewing challenged material. One of the things it said was that challenged materials needed to be judged "as a whole." Thus, if a book as a whole was O.K., even if parts of it were objectionable, the book would probably be considered acceptable. If this standard had been applied to 365 Days, it might not have been banned, because there were only a couple of chapters that were considered really objectionable. In fact, most of the members of the School Committee who voted to ban the book had seen and read only the chapter which was considered the worst. The School Committee, however, chose not to apply the new policy to 365 Days. So that book remained banned.

Baileyville's book banning became the subject of a lawsuit filed in the United States District Court in Maine. Here is part of what the Court said.

Sheck v. Baileyville School Committee
530 F.Supp. 679 (D. Maine 1982)

CYR, District Judge.

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> More than a decade ago the Supreme Court handed down its landmark decision...recognizing that secondary school students "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." Book bans do not directly restrict the readers' right to initiate expression but rather their right to receive information and ideas, the indispensable reciprocal of any meaningful right of expression...Courts recognizing a constitutional right to receive information emphasize the inherent societal importance of fostering the free dissemination of knowledge and ideas in a democratic society. ...
>
> ...The right to receive information and ideas is nowhere more vital than in our schools and universities. ...Secondary school libraries are forums for silent speech. ...Public schools are major marketplaces of ideas, and First Amendment rights must be accorded all persons in the market for ideas, including secondary school students... .

The School Committee argued that they did not ban 365 Days because of its content. In fact, the school library continued to carry books that described what the fighting in Vietnam was all about and books both for and against the war. They argued that the First Amendment prohibits the government from regulating the content of speech, but, in the school environment, it should not be read to prohibit actions which regulate simply the speakers' choice of words.

The social value of...censored expression is not to be sacrificed to arbitrary official standards of *taste in vocabulary....* As long as words convey ideas, federal courts must remain on First Amendment alert in book banning cases, even those ostensibly based on vocabulary considerations. A less vigilant rule would leave the care of the flock to the fox that is only after their feathers.

On the other hand, an appropriate balance...must be struck among the traditional rights of parents in the rearing of their own children..., the power of the state to control public schools..., and individual rights of free expression. In the context of public school education considerable deference must be accorded parents and local school authorities in determining the effect upon students of exposure to reading material. ...The court would be *reluctant...* to rule out an appropriate parental role in prescribing standards of taste in the reading materials to which one's own children may be exposed in the extracurricular environment of the school library...

On the other hand, a book may not be banned from a public school library in disregard of the requirements of the Fourteenth Amendment. ...First Amendment free speech is a fundamental individual liberty which no state may withhold without due process *which is protected by the Fourteenth Amendment.*

...In order to avoid chilling legitimate speech...governmental regulation of free speech...must be limited by reasonably precise...standards. ...*At the very least,* the Fourteenth Amendment...mandates that governmental units adhere to their own rules and regulations... .

***

Here, the Committee appears to have considered the challenge to 365 Days on the basis of the subjective standards of its individual members... . *The book may be objectionable for some but not all students.* The criteria to be considered in advance of state action restricting student access to objectionable language include the age and sophistication of the students, the closeness of the relation between the specific technique used and some concededly valid educational objective, and the content and manner of presentation. ...There is no evidence that the Committee has accorded appropriate consideration to these criteria. The ban was imposed without regard to the age and sophistication of students. It is difficult to understand how at least two members of the Committee, who have not read the book, could have given fair consideration to its content. *The Court orders the book returned until it is given fair consideration under the Challenged Materials Policy, considering the criteria the Court has specified.*

The First Amendment and "Public Forum"

The Case of the Offensive Yearbook

If you or your parents invite someone to your home and they start saying things which are deeply offensive to you, do you have the right to give them the boot? Sure, you do. It's your property. If a publisher agrees to put up the money to pay for publishing a book of poems you are writing, does the publisher have the right to insist you keep certain poems out if the poems are not to her liking? Of course! It's the same idea as kicking someone out of your house.

If the government puts up the money to publish a book, does it have the same right to restrict what goes into the book? Maybe, but not if the book is a high school yearbook, as the Brunswick School Department found out in 1984. In that year, Joellen Stanton, a graduating Brunswick High School senior, wanted to have the following quote about executions of convicted criminals in the United States included next to her picture in the yearbook:

> The executioner will pull this lever four times. Each time 2000 volts will course through your body, making your eyeballs first bulge, then burst, and then broiling your brains...

The yearbook's student editors and faculty advisor, the high school principal, and the Brunswick Board of Education thought this quote was pretty strong stuff for a yearbook. Too strong. They tried unsuccessfully to persuade Joellen to choose a different quote. When she refused, they refused to include the quote. She took them to Court, arguing that she had a First Amendment right to put any quote she wanted in the yearbook.

An interesting question is whether this case would have come out the same way if it had been brought after the Supreme Court decided the case of Hazelwood v. Kuhlmeier in 1988. (Hazelwood is included in these materials.)

Stanton v. Brunswick School Department
577 F.Supp.1560 (D. Maine 1984)

CARTER, District Judge.

...For the last ten years...the *school authorities* have published the high school yearbook at the conclusion of each school year. ...The yearbook has contained a section in which pictures of all of the members of the senior class appear together with biographical information about each student and a short quotation selected for inclusion by each student. ...In the last several years student quotations have appeared in the yearbook encouraging the use of unlawful drugs and alcohol, and student quotations also have appeared in the yearbook from various "rock and roll" artists, some of whom speak in negative terms about traditional American values and *make* statements which glorify sexual activity. ...Plaintiff claims that this utilization of the annual high school yearbook *makes* that publication, for First Amendment purposes, "a public forum."...

On or about November 1, 1983, Brunswick High School senior students were required to turn in information forms providing to the year book staff the biographical information to be included in the yearbook, as well as the individual student's selected quotation. ...The Plaintiff returned such an information form. ...The Plaintiff's designated quotation was indicated on the information form. *After reviewing Plaintiff's form, both the yearbook advisor and the principal attempted to persuade Joellen to select a different quotation. She refused. The principal refused to publish it.* The reason for the rejection of the quotation for publication given by the faculty members and the *principal* was "that the quotation was too graphic and was unacceptable for public consumption. ...The quotation could not be printed because it would be "disruptive to the community."

...Audrey Harlow, a senior at Brunswick High School, who serves as editor-in-chief for the 1984 *yearbook explained to the Court that* "it is the policy of the yearbook staff that the materials published in the yearbook be tasteful and appropriate for all students and people in the community in 1984 and in future years. ...After reading the quote, I felt strongly and still feel strongly that the wording of the quote is not appropriate for the yearbook and agreed that it should not be approved. I would approve a statement either for or against the concept of capital punishment, if the wording were appropriate for the yearbook." *Another senior, Emily Moll, testified to the Court that she explained to the senior class before handing out the biographical sheets that yearbook policy was to exclude inappropriate material, particularly if it concerned alcohol, sex, or drugs. However, Plaintiff did not remember hearing any such statement.*

Plaintiff explained her reason for choosing the particular quote for the yearbook: "The reason I chose the quotation I selected was to possibly provoke some of my classmates to think a little more deeply than if I had written a standard butterfly quote. I wanted to make them aware of the realities that exist in today's world. ...It is important to think about these things because we are seniors and we are going to be on our own very soon."

***

The evidence shows that in past years the Brunswick High School Yearbook has been permitted...to serve the purpose of affording a forum in which senior students may express their personal views, opinions, and ideas through the selection of quoted material. *The school authorities* have created of the Brunswick High School yearbook a...public forum for the expression of senior students' personal ideas. ...

We must now consider the constitutional legitimacy of the standards that were applied by the editorial board and the school authorities to restrict Plaintiff's right of free expression. ...Free public expression may not be subjected to governmentally sponsored censorship by vague, subjective or nondiscrete standards. Public officials may not exercise *unlimited* discretion in regulating the content of public speech. ...Free public expression cannot be burdened with governmental predictions or assessments of what a discrete populace will think about good or bad "taste."...

We need not shrink from the hazards of a free people saying without restraint what they believe. We have a sufficient security in the Framers' profound conviction that the decency and sound judgment of an informed citizenry will, in good time, winnow the rash statement from the reasonable one, reject the foolish proposal for the principled one, discern the zealot from the diplomat, and distinguish the demagogue from the democrat. ...

Rejection of Plaintiff's designated quotation on the basis of a standard of "poor taste" or "appropriateness"...fixes no discrete, objective limits to the determination of what may or may not be published therein. The sense of vigor which *free expression, including tasteless expression* brings to the direction of the affairs of the Republic may not be denied...and that driving force may not be suppressed by government intervention in the name of "good taste" or "appropriateness."

The First Amendment and "Offensive Speech"

The Case of the Vulgar Gesture

As we have seen, students do not possess all of the same rights in school that they have outside. Teachers and other school authorities are allowed to forbid speech that is disruptive or disrespectful of others, and to punish those who disobey. But what are the rules outside of school, regarding the interaction of students and teachers? In the following case, a student was suspended from Oxford Hills High school when, in the parking lot of a restaurant in South Paris, he "extended the middle finger of one hand" at his English teacher. He appealed that suspension in Federal District Court.

Klein v. Smith

635 F.Supp. 1440 (D.Me. 1986)

CARTER, D.J.

Of all the griefs that harrass the distress'd,
Sure the most bitter is a scornful jest;
Fate never wounds more deep the gen'rous heart,
Than when a blockhead's insult points the dart.
Samuel Johnson, London (1738)

The matter before the Court is whether the plaintiff, Jason Klein, who is a student at Oxford Hills High School, may be suspended from school for making a vulgar gesture to a teacher off school grounds and after school hours.

The parties have stipulated to the facts set forth by teacher Clyde Clark in his affidavit. On April 14, 1986, Mr. Clark drove his son to Michel's Restaurant in South Paris, Maine so that his son could apply for a job there. He parked his car facing the side entrance of the restaurant and waited in the car while his son went inside. Another car pulled up to the side entrance and stopped perpendicular to the Clark car. Plaintiff Jason Klein was seated in the passenger seat of the other car. Mr. Klein extended the middle finger of one hand toward Mr. Clark, exited the car in which he was seated, and entered the restaurant.

As a result of this incident, Klein was suspended from school for ten days pursuant to a school rule that provides that students will be suspended for "vulgar or extremely inappropriate language or conduct directed to a staff member." In response, Klein filed a Complaint and Motion for a Temporary Restraining Order, seeking to enjoin the Defendant from suspending him until this Court had an opportunity to review the merits of Plaintiff's action. This Court granted Plaintiff's motion "to restore the status quo in this matter until the Court...fully evaluates the issues raised." A full hearing and oral arguments have now been had, and the matter is before the Court on Plaintiff's claim for a permanent injunction against the disciplinary suspension.

The conduct in question occurred in a restaurant parking lot, far removed from any school premises or facilities at a time when teacher Clark was not associated in any way with his duties as a teacher. The student was not engaged in any school activity or associated in any way with school premises or his role as a student. Any possible connection between his act of "giving the finger" to a person who happens to be one of his teachers and the proper and orderly operation of the school's activities is, on the record here made, far too attenuated to support discipline against Klein for violating the rule prohibiting vulgar or discourteous conduct toward a teacher. The gesture does not constitute "fighting words" which might justify stripping the communicative aspects of the gesture of a protected status under the First Amendment. ...

Anyone would wish that responsible teachers could go about their lives in society without being subjected to Klein-like abuse. But the question becomes ultimately what should we be prepared to pay in terms of restriction of our freedom to obtain that particular security. As this Court has observed in another, but similar, context:

> The public interest may be thought to be best served if schools and teachers practice the historical orthodoxies of our political freedom while they preach the temporally transitory orthodoxies of "taste." They may legitimately, and should, seek to inculcate the latter, but they may not, in the effort to do so, transgress upon the former. In the final analysis, under our Constitution individual liberty of expression must be accorded its day even at the expense of the promotion of aesthetic sophistication.

...The First Amendment protection of freedom of expression may not be made a casualty of the effort to force-feed good manners to the ruffians among us.

Accordingly, the ten-day suspension imposed upon the Plaintiff as a disciplinary sanction for violating the rule cannot be sustained in the circumstances of this case in the face of his right of free speech under the First Amendment of the Constitution of the United States. ...

The prayer of the Plaintiff for a permanent injunction against the continuing imposition of that sanction is hereby granted. ...

The First Amendment and Obscenity

Permissible Limitations on Freedom of Speech

Obscenity is one of the exceptions to freedom of speech. However, deciding what is obscene can be difficult. The standard for determining obscenity was set in 1973 by the United States Supreme Court in the case of Miller v. California, 413 U.S. 15. In that case, the Supreme Court said that, to be obscene, the material had to meet three tests:

1) Whether the average person, applying contemporary community standards, would find that the work as a whole appealing to the prurient interest ("unhealthy sexual appetites");
2) Whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law; and
3) Whether the work as a whole lacks serious literary, artistic, political, or social value.

One famous recent case dealing with obscenity is that of Skyywalker Records, Inc. v. Navarro, 537 F.Supp. 578 (S.D.Fla. 1990) - the "2 Live Crew" case. The owner of a record store was arrested under Florida law for selling the recording "As Nasty As They Wanna Be." In that case, the court found that the lyrics absolutely appealed to the prurient interest, and that sexual conduct was "depicted in graphic detail." Finally, the judge rejected 2 Live Crew's claim that the songs had any value.

The issue has also arisen here in Maine.

In 1982, the City of Portland enacted an anti-obscenity ordinance. In the case of City of Portland v. Jacobsky, decided in 1983, Maine's highest Court, the Supreme Judicial Court, upheld the ordinance under the First Amendment and the provision in the Maine Constitution which protects speech. In other words, the Maine Supreme Court agreed with the United States Supreme Court that obscenity can be banned.

At just about the same time that Portland passed its anti-obscenity ordinance, Lewiston did the same thing. But there was a big difference. Whereas the Portland ordinance was geared to preventing any person from getting his hands on obscene material, the Lewiston ordinance was focused on minors. A "minor" is any person under 18, and under the Lewiston law, minors would be prohibited from seeing or purchasing materials which would be considered obscene for young people. The major part of the ordinance said the following:

It shall be unlawful for any person knowingly to exhibit, expose or display at any place frequented by juveniles, or where juveniles are invited as part of the general public:

(1) Any book, pamphlet, magazine, printed matter, however reproduced, drawing, picture photograph, figure, image, sculpture, article or similar visual representation or image which depicts sexually explicit nudity, sexual conduct, sexual excitement or sadomasochistic abuse, which is harmful to juveniles.

(2) Any phonograph record, or sound recording, of any type, which contains explicit and detailed verbal descriptions or narrative accounts of sexual conduct, sexual excitement or sadomasochistic abuse, which is harmful to juveniles.

The ordinance did not apply to museums or libraries but to everyone else. Imagine you were a bookseller in Lewiston. What would you have to do to comply with the ordinance? That problem worried the owner of the Bookland stores, who took the City of Lewiston to Court. In 1983, the Androscoggin County Superior Court ruled the Lewiston ordinance violated the United States Constitution.

Bookland of Maine, Inc. v. City of Lewiston

CV - 83 - 307 (Civil Action, Androscoggin Superior Court) (1983)

SCOLNICK, J.

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The plaintiff contends that the ordinance is impermissibly overbroad and violates the rights of adults under the First Amendment of the United States Constitution. The Court agrees.

...(O)bscenity is not protected speech *but not all works containing explicit sexual references are obscene as to adults, at least.* The City...has a legitimate interest in protecting the well being of its children, and *can legitimately place restrictions on materials which are not obscene as to adults in order to protect minors.* A regulation that is overly broad *and restricts the First Amendment rights of adults in order to protect children*, however, invites more mischief than it cures, and will...be declared invalid.

Although...the Lewiston ordinance does not prohibit sale to adults, a *store owner faced with the ordinance has to do one of three things to comply* with its display provisions:

(1) exclude all juveniles from the store entirely if it wishes to sell material "harmful to juveniles" but suitable for adults;

(2) refrain from displaying any "harmful" materials but permit children to have access to the store; or

(3) employ...measures suggested by city officials...such as setting aside "adults only" areas...or keeping "harmful" books and magazines behind the counter and require adults to ask for them by name.

The consequences of...options (1) and (2) would either be to (1) prevent children from having access to the store and hence to books otherwise suitable for them because the store carried "harmful books", or (2) to prevent adults from having access to suitable adult literature if children also enter the store. In either event, juveniles or adults are adversely affected since one of those groups would not have the right to browse through or buy books that are suitable to each. ...Option (3) presents a different problem. "Adult" materials are seldom examined or purchased when potential buyers are unable to browse anonymously without calling undue attention to themselves. Actual experience under the ordinance confirms that sales of adult literature were substantially reduced when stored behind the counter. The *creation of an "adults only" area has an embarrassing effect on adult customers* and "chills" their right to free speech and access to books and magazines.

Thus...the Lewiston ordinance...would reduce the adult population to reading only what is fit for juveniles. Accordingly, the ordinance...violates the rights of adults under the First Amendment of the United States Constitution.

The ordinance also violates the rights of juveniles. ...(J)uveniles are also entitled to First Amendment protection. *The Lewiston ordinance does not require that the work be taken as a whole when determining if it is obscene for minors.* Under the ordinance, the sale of a literary classic would be prohibited if it contained a passage which could be construed as printed matter depicting sexual conduct which is harmful to juveniles. Expression may be regulated, even as to minors, only if the work *obscene when* is "taken as a whole." ...Because of this fatal omission, the *Lewiston ordinance* is unconstitutionally overbroad as to juveniles.

The First Amendment and Freedom of the Press

The Government, The New York Times, and The "Pentagon Papers"

National security is a legitimate governmental concern, and may, under certain limited circumstances, justify limiting freedom of the press. In the famous case which follows, Daniel Ellsberg, an employee of the Pentagon, had given the New York Times a copy of a secret Pentagon study called "History of U.S. Decision Making Process on Vietnam Policy." In his Sunday Times editorial column on June 16, 1991, Leslie Gelb, one of the original authors of the study, defined their mission as follows:

> Make the studies encyclopedic and objective. Preserve ths substance of the documentary record. And let the chips fall where they may. ...*We* were afflicted with a passion to preserve the record. We feared that unless we finished the job, these fragments of truth we had collected would never be assembled again, and that this "documentary" story of America and Vietnam would vanish.

When the Government learned that Ellsberg had given a copy of the study to the New York Times, and after the paper had published three in a series of installments on the study, it obtained a court order forbidding the paper to further publish the "Pentagon Papers" until a ruling could be made on whether their publication would actually harm national security, or merely embarrass the Nixon Administration. The Supreme Court, hearing the case, was asked to answer the following question:

Can the judiciary prevent the publication of material which the government deems harmful to the national interest in the absence of a statute on the matter?

By a vote of 6 to 3, their answer was no.

New York Times Company v. United States

403 U.S. 713 (1971)

PER CURIAM (no single justice was identified as writing a majority opinion). Justices Black, Brennan, Stewart, White, Marshall, and Douglas concurred. Chief Justice Burger, and Justices Harlan and Blackmun, dissented.

Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *The lower courts* held that the Government had not met that burden. We agree.

BLACK, J., concurring.

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In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do... .

The First Amendment and Freedom of the Press

The Rights of "School-Sponsored" Newspapers

Your school probably has a school newspaper, which the school budget supports, at least in part. What happens if the student editors of the paper want to print something that the school authorities want to keep out? This was the situation at Hazelwood East High School in Hazelwood, Missouri. The justices of the Supreme Court decided that when the school sponsors a newspaper, or a play, or a glee club concert, it has more rights over what may be "expressed" than when students are expressing only their own viewpoint, as they were in the case of Tinker v. Des Moines School System. In Stanton v. Brunswick School Department, decided in 1984, the Federal District Court for Maine answered a similar question differently. Stanton is included in these materials. Do you think the ruling in Stanton would be the same had it been decided after the Supreme Court's ruling in Hazelwood?

Hazelwood School District v. Kuhlmeier

484 U.S. 260 (1988)

WHITE, J., joined by Rehnquist, C.J., and Justices Stevens, O'Connor, and Scalia. Justices Brennan, Marshall, and Blackmun dissented.

This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.

Petitioners are various members of the Hazelwood School District and its officials, including Robert E. Reynolds, Hazelwood High School principal. Respondents are three former Hazelwood High School students who were staff members of Spectrum, the school newspaper. They contend that respondents violated their First Amendment rights by deleting two pages of articles from the May 13, 1983, issue of Spectrum.

...On May 10, 1983, *the faculty advisor to Spectrum* delivered the proofs of the May 13 edition to Principal Reynolds *for his customary review prior to publication. Reynolds* objected to two of the stories scheduled to appear in that edition. One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school.

Reynolds was concerned that, although the pregnancy story used false names "to keep the identity of the girls a secret," the pregnant students might still be identifiable from the text. He also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. *In the divorce story, Reynolds was concerned that one student's parents were not given an opportunity to respond to their daughter's accusations of neglect during the marriage, or to consent to the article's publication.* ...He directed the faculty advisor to withhold from publication the two pages containing these stories. *The rest of the paper was printed and distributed as scheduled.*

Respondents, at trial, sought a declaration that their First Amendment rights had been violated,...and money damages. After a bench trial, the District Court *held* that no First Amendment violation had occurred.... The Court of Appeals ...reversed, *holding that under Tinker v. Des Moines School District the principal could not reasonably have believed that the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school....* Accordingly, the court held that school officials had violated respondents' First Amendment rights by deleting the two pages of the newspaper. We granted certiorari, and we now reverse.

. . .The First Amendment rights of students in public schools are not equal with the rights of adults in other settings,...and must be applied in light of the special characteristics of the school environment.... A school need not tolerate student speech that is inconsistent with its basic educational mission,...even though the government could not censor similar speech outside the school....

The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board...rather than with the federal courts.

***

The question in Tinker...whether the First Amendment requires a school to tolerate student speech is different from the question *whether the school must be required affirmatively to promote it*.... This case addresses educators' authority over school-sponsored publications, theatrical productions, and other expressive activities *officially part of the school*.... Educators are entitled to exercise greater authority over *the latter than the former*. ...Educators do not offend the First Amendment by exercising control over the style and content of student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate academic concerns. ***

The principal's concerns over the appropriateness of the material, and his concerns for the privacy of those cited, were reasonable under the circumstances. Accordingly, no First Amendment violation occurred.

BRENNAN, J., dissenting, joined by Justices Marshall and Blackmun.

...The principal broke more than just a promise. He also violated the First Amendment's prohibition against censorship of any student expression that neither disrupts classwork nor invades the rights of others....

The First Amendment does not give school authorities the right to censor all speech with which they disagree. Just as the public on the street corner must...tolerate speech that *may offend*, public educators must accommodate some student expression even if it offends them or offers views or values that contradict those that the school wishes to *encourage*.

***

Instead of teaching children to respect the diversity of ideas that is fundamental to the American system,...and that our Constitution is a living reality, not parchment preserved under glass,...the Court today teaches youth to discount important principles of our government as mere platitudes.... The young men and women of Hazelwood High School expected a civics lesson, but not the one the Court teaches them today.

The First Amendment and the Press

What Happens When a Newspaper Hurts Your Reputation?

One of the exceptions to freedom of speech and the press is known as defamation, which consists of slander (personally harmful, untrue spoken speech) and libel (the same, but in printed form.) The standard for deciding when someone has been defamed was set by the Supreme Court in 1964. The Sullivan test is still the law today. For a person to win a defamation suit, he or she must show that the statement of fact made referred to him or her; that it was "published," that is, not made privately; that it was untrue; and that it hurt his or her reputation. A "public figure," someone who has put him or herself into the public eye, must also prove that an untrue statement was made with "actual malice:"

> ...(T)hat is, with knowledge that it was false or with reckless disregard of whether it was false or not.

In 1982, the Bangor Daily News published a photo of Clinton Caron, a Waterville police sergeant, at a Waterville murder scene. Three days later, in an editorial, the paper stated that Sergeant Clinton "by any reasonable standard carries too much mass to be either an effective cop on the beat or a tribute to his uniform." Sergeant Clinton sued, saying that the editorial had defamed him. The Bangor Daily News answered that the column was an editor's opinion, and therefore could not be libel under the Sullivan standard; and that Sergeant Caron was, by any factual measure, overweight. The Maine Supreme Court, in the case of Caron v. Bangor Publishing Company, 470 A.2d 782 (Me. 1984), agreed with the newspaper.

> ...An essential element of libel is that the publication in question must contain a false statement of fact... . Thus, if the Bangor Daily News editorial is a statement of opinion, it is not actionable... . We conclude that the allegedly libelous statements contained in the editorial cannot reasonably be construed as a statement of objective fact... . Because the editorial is an expression of opinion based on disclosed non-defamatory facts, *Sergeant Caron must lose.*

In the Sullivan case, the Supreme Court dismissed a libel judgment from an Alabama jury, which had been upheld by the Alabama Supreme Court. In addition to setting the requirements for defamation, the case is significant because the Court provides less defamation protection to public figures than to private individuals, contrary to what had been Alabama law.

New York Times Co. v. Sullivan

376 U.S. 254 (1964)

BRENNAN, J., joined by Chief Justice Warren and Justices Clark, Harlan, Stewart, and White. Justices Black, Douglas, and Goldberg concurred separately.

> We are required in this case for the first time to determine the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.
>
> Respondent L.B. Sullivan is one of three elected Commissioners of the City of Montgomery, Alabama. *He is the Superintendent of the police and fire departments.* He brought this civil libel action against...petitioner the New York Times Company, a New York corporation which publishes the New York Times, a daily newspaper. A jury in the circuit court of Montgomery County awarded him damages of $500,000 against... the petitioner, and the Supreme Court of Alabama affirmed.
>
> Respondent's complaint alleged that he had been libeled by statements in a full page advertisement that was carried by the New York Times on March 29, 1960. Entitled "Heed their rising voices," the advertisement began by saying that "as the whole world knows, thousands

of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." It went on to charge that

> "in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom."

Succeeding paragraphs... illustrated the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right to vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery....

Of the ten paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

Third paragraph:

> "In Montgomery, Alabama, after students sang "My Country,'Tis of Thee" on the State Capital steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an effort to starve them into submission."

Sixth paragraph:

> "Again and again Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home, almost killing his wife and child. They have assaulted his person. They have arrested him seven times - for 'speeding,' 'loitering,' and similar 'offenses.' And now they have charged him with 'perjury' - a felony under which they could imprison him for ten years."

Although neither of these paragraphs mentioned respondent by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with police.... As to the sixth paragraph, he contended that...the statement "they have arrested Dr. King seven times" would be read as referring to him.... .

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem, and not "My Country, 'Tis of Thee."... The campus dining hall was not padlocked on any occasion.... Not the entire student body, but most of it, had protested the expulsion; not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the *next* semester.

***

...We reverse the judgement. We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct. We further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

...*Respondent contends that freedom of the press* is inapplicable here,...because the allegedly libelous statements were published as part of a paid, "commercial" advertisement.... That the Times was paid for publishing the advertisement is...immaterial... . Any other conclusion would discourage newspapers form carrying "editorial advertisements" of this type, and so might shut off an important outlet...to *those* who do not themselves have access to publishing facilities... .

Under Alabama law..., if [a person is libelled] the words "tend to injure a person in his reputation, or to bring him into public contempt."... A jury must find that the words were published *and concerned* the plaintiff, but where the plaintiff is a public official *that fact* is sufficient evidence to support a finding that his reputation has been affected by statements that reflect on the agency of which he is in charge. Once libel is established, *there is no defense* unless *the defendant* can persuade the jury that the words were true in all their particulars....

The question before us is whether this rule of liability...abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

...The Constitution does not protect libelous publications. *However, libel* must be measured by standards that satisfy the First Amendment... . We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include...sometimes unpleasantly sharp attacks on government and public officials.... The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would clearly seem to qualify for constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements....

A defense for erroneous statements honestly made is...essential... . The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

***

In this case the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence...it would not constitutionally sustain the judgment for the respondent under the proper rule of law.... The facts do not support a finding of actual malice....

We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent... . There was no reference to respondent in the advertisement, either by name or official position.... Although *some of* the statements may be taken as referring to the police, they did not make any reference to respondent as an individual.

Judgement reversed.

The First Amendment and the Press

Disclosure of Press Sources

It can be said that courts generally protect the right of newspapers to print as they see fit, without interference from the government. The First Amendment protects this right. But what happens when the First Amendment right of the press is in conflict with another Bill of Rights guarantee? The Sixth Amendment protects a criminal suspect's right to a fair trial, including "obtaining witnesses in his favor." If a reporter is called to testify by a suspect, and asked about the sources for a story he or she wrote, which amendment should prevail - the First, or the Sixth?

In the following case, a newspaper reporter refused to testify even after being ordered by the court to do so, and was found guilty of criminal contempt of court. He appealed that conviction.

State v. Hohler

543 A.2d 364 (Me. 1988)

ROBERTS,J., joined by Chief Justice McKusick and Justices Wathen, Glassman, Scolnick, and Clifford. There was no dissent.

> ...Hohler urges us to 1) recognize a qualified privilege for a reporter to refuse to testify concerning matters related to the news gathering process; and 2) determine that the State failed to overcome this qualified privilege, and thus conclude that he properly refused to answer questions concerning the interview. We hold that in the factual circumstances of this case Hohler was not entitled to invoke a qualified privilege. Accordingly, we affirm the contempt conviction.
>
> ...In recognizing a qualified privilege *other courts* have emphasized that if such a privilege is not recognized, the reporter's duty to gather news and disseminate it to the public is hindered in at least two respects: 1) potential sources will refuse to give interviews for fear that their names will be revealed if the reporter is called to testify...*and* 2) in addition, those in the media will choose not to publish information that could potentially result in employees spending substantial amounts of time testifying in criminal or civil proceedings... .
>
> In this case, the published article contains the name of the source... . In addition, by Hohler's own admission, everything that *the source* revealed to him in the interview was included in the article that Hohler wrote and published in the Concord Monitor... .
>
> Hohler fails to persuade us that the Constitution compels us to recognize a privilege for a reporter to refuse to testify concerning non-confidential, published information... . We are convinced that nothing in the Constitution compels us to recognize a qualified privilege in the circumstances this case.
>
> ...We find it necessary to emphasize the narrow scope of the question that we have answered today: we refuse to recognize a qualified privilege for a reporter not to testify concerning non-confidential, published information obtained from an identified source. We intimate no opinion as to whether there is a qualified privilege for a reporter to refuse to reveal confidential sources; confidential, unpublished information; or non-confidential, unpublished information. Moreover, we emphasize that the record before us is devoid of any suggestion of official harassment or intimidation of the news media or any suggestion of the misuse of media sources for investigative purposes.

The Right to Peaceably Assemble

How "Peaceable" Must It Be?

The right to assemble is almost always tied to the right to freedom of speech, since most gatherings of people involve either spoken or "pure" speech. As with the other clauses of the First Amendment, the right to peaceably assemble is one that the government may only limit upon a showing of compelling cause, such as where there is a likelihood of actual physical harm, either to those assembling or to those against whom the gathering is directed. Because of this, the Supreme Court of the United States, as well as state supreme courts, have had to outline just what is "peaceable." In 1978, in the case of Skokie v. National Socialist Party of America, 69 Ill.2d 597, the Illinois Supreme Court had to decide whether the American Nazi Party could be forbidden a parade permit to march through the town of Skokie, Illinois, a town that was more than half Jewish, of whom about 15% were Nazi concentration camp survivors. The Court clearly recognized the anguish of the residents of the town:

> (A) resident of Skokie testified that he was a survivor of the Nazi holocaust. He further testified that the Jewish community in and around Skokie feels the purpose of the march in the heart of the Jewish population is to remind the two million survivors 'that we are not through with you' and to show 'that the Nazi threat is not over, it can happen again.'

However, the Court held that the parade must be allowed to take place:

> It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers... . Plaintiff urges, and the appellate court has held, that the exhibition of the Nazi symbol, the swastika, addresses to ordinary citizens a message that is tantamount to fighting words (defined as 'extremely hostile personal communication likely to cause immediate physical response.')... . (W)e are precluded from doing so.
>
> ...We cannot lose sight of the fact that, in what...might seem an annoying instance of individual distasteful abuse of a privilege,...fundamental societal values are truly implicated. So long as the means are peaceful, the communication need not meet standards of acceptability.
>
> ...We do not doubt that the sight of this symbol is abhorrent to the Jewish citizens of Skokie, and that the survivors of the Nazi persecutions, tormented by their recollections, may have strong feelings regarding its display....
>
> We...reluctantly conclude that the display of the swastika cannot be enjoined under the fighting words exception to free speech, nor can anticipation of a hostile audience justify *forbidding the parade permit.*

The Supreme Court of the United States dealt with the issue a number of times in the context of the civil rights movement. In the following 1965 case, it declared that a black minister's conviction for disturbing the peace during a sit-in violated his First Amendment rights of free speech and peaceable assembly.

Cox v. State of Louisiana
379 U.S. 536 (1965)

GOLDBERG, J., joined by Chief Justice Warren and Justices Douglas, Brennan, and Stewart. Justices Black, White, Harlan, and Clark concurred in part and dissented in part.

***

On December 14, 1961, 23 students from Southern University, a Negro college, were arrested in downtown Baton Rouge, Louisiana, for picketing stores that maintained segregated lunch counters. This picketing, urging a boycott of those stores, was part of a general protest movement against racial segregation, directed by the local chapter of the Congress of Racial Equality, a civil rights organization. The appellant, an ordained Congregational minister,...was an advisor to this group. On the evening of December 14, *he* spoke at a mass meeting at the college. The students resolved to demonstrate the next day in front of the courthouse in protest of segregation and the arrest and imprisonment of the picketers who were being held in the parish jail on the upper floor of the courthouse building.

The next day, when Cox arrived, 1500 of the 2000 students were assembling at the site of the old State Capitol building, two and one-half blocks from the courthouse.... The police had learned of the proposed demonstration the night before from news media and other sources. Captain Font of the City Police Department...approached the group and spoke to Cox *who* identified himself as the group's leader.... *He* told the officers that they would march by the courthouse, say prayers, sing hymns, and conduct a peaceful program of protest. The officer repeated his request to disband and Cox again refused....

As Cox, still at the head of the group, approached the vicinity of the courthouse, *he met with the Chief of Police, who* told Cox that "he must confine the demonstration to the west side of the street." ... Cox testified that the officials agreed to permit the meeting....

The students were then directed by Cox to the west sidewalk, across the street from the courthouse.... The group did not obstruct the street.... Cox then said:

> All right. It's lunch time. Let's go eat. There are twelve stores we are protesting. A number of these stores have twenty counters; they accept your money from nineteen. They won't accept it from the twentieth counter. This is an act of racial discrimination. These stores are open to the public. You are members of the public. We pay taxes to the Federal Government and you who live here pay taxes to the State.

The Sheriff, deeming...Cox's appeal to the students to sit in at the lunch counters to be "inflammatory," *ordered them to leave.* It is clear from the record that Cox and the demonstrators did not then and there break up the demonstration....

Almost immediately thereafter...one of the policemen exploded a tear gas shell at the crowd. This was followed by several other shells. The demonstrators quickly dispersed...; Cox tried to calm them as they ran and was himself one of the last to leave.

...The next day appellant was arrested and charged with *criminal conspiracy, disturbing the peace, obstructing public passages, and picketing before a courthouse.*

***

It is clear to us that on the facts of this case...Louisiana infringed appellant's rights of free speech and free assembly.... We hold that Louisiana may not constitutionally punish appellant under this statute for engaging in the type of conduct which this record reveals.... The record...shows no conduct which the State had a right to prohibit as a breach of the peace....

Our conclusion that the entire meeting from the beginning until its dispersal by tear gas was orderly and not riotous is confirmed by a film of the events taken by a television news photographer.... We have viewed the film, and it reveals that the students, though they undoubtedly cheered and clapped, were well-behaved throughout.

...It is virtually undisputed...that the students themselves were not violent and threatened no violence. The fear of violence seems to have been based upon the reaction of the group of white citizens looking on from across the street... . Constitutional rights may not be denied simply because of hostility to their assertion or exercise... . A function of free speech under our system of government is to invite dispute... . Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy... .

Appellant was convicted of *obstructing public passages*...for leading the meeting on the sidewalk across the street from the courthouse... . He contends that the statute is an unconstitutional infringement on freedom of speech and assembly.

The issue is the right of a State or municipality to regulate the use of city streets and other facilities to assure the safety and convenience of the people in their use and the *equal* right of the people of free speech and assembly... . The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time... . *But this* statute itself provides no standards for the determination of local officials as to which assemblies to permit or which to prohibit... . From all the evidence before us it appears that the authorities in Baton Rouge permit or prohibit parades or street meetings in their completely uncontrolled discretion.

***

This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This...permits the official to act as a censor.... *It* is clear that the practice in Baton Rouge allowing unfettered discretion in local officials in the regulation of the use of the streets for peaceful parades and meetings is an unwarranted abridgement of appellant's freedom of speech and assembly secured to him by the First Amendment, as applied to the states by the Fourteenth Amendment.... Appellant's convictions...must be reversed.

The case which follows, coming some five years later, made it clear that laws that restrict the right to peaceably assemble had to clearly define what was and was not permitted. As they had stated in Cox, the Justices were firm that laws that gave too much discretion to local officials in deciding what behavior was or was not allowed would be declared a violation of the First Amendment.

Coates v. City of Cincinnati
402 U.S. 611 (1971)

STEWART, J., joined by Justices Douglass, Harlan, Brennan, and Marshall. Justice Black concurred separately. Chief Justice Burger and Justices White and Blackmun dissented.

A Cincinnati, Ohio, ordinance makes it a criminal offense for "three or more persons to assemble...on any of the sidewalks...and there conduct themselves in a manner annoying to persons passing by...." The issue before us is whether this ordinance is unconstitutional on its face. *Coates was* convicted of violating the ordinance.

...If three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by. In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

Conduct that annoys some people does not annoy others. Thus the ordinance is vague...in the sense that no standard of conduct is specified at all. As a result, men of common intelligence must necessarily guess at its meaning.

...The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited... . It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed.

...The ordinance also violates the constitutional right of free assembly and association.... Mere public intolerance or animosity cannot be the basis for the abridgement of these constitutional freedoms... . If this were not the rule, the right of the people to gather in public places for social or political purposes would...contain an obvious invitation to discriminatory enforcement against those whose association together is annoying because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens.

The ordinance before us makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution....

The Right to Peaceably Assemble

What Restrictions Are Constitutional?

The First Amendment clearly protects the right of assembly and, with it, the right of "free association" - to pick and choose those with whom you want to assemble. Private organizations, unlike those open to the general public, are even free to discriminate on the basis of race, sex, religion, or anything else in exercising this right. The following case involves a private organization, the Benevolent and Protective Order of Elks, which, at least in 1972 when this case was heard, restricted its membership to "whites." Did the State of Maine have to grant such an organization a license to serve alcohol in its clubhouses? The Supreme Judicial Court of Maine held that it did not, and that failure to do so did not violate the First Amendment right of assembly.

B.P.O.E. Lodge No. 2043 of Brunswick v. Ingraham

297 A.2d 607 (Me. 1972)

WERNICK, J., joined by Dufresne, Chief Justice, and Justices Webber, Weatherbee, and Pomeroy.

* * *

On January 6, 1971..., the *State Liquor* commission...denied issuances of licenses for 1971 to all of the fifteen plaintiffs in the...case.... As grounds for its denial, the Commission stated that the "whites" only limitation *justified it.*

... We conclude that the Commission's ultimate denial of license renewals was justified under the public policy of the State of Maine, as stated in...17 M.R.S.A. 1301-A *which stated as follows:*

> No person, firm, or corporation holding a license under the State of Maine or any of its subdivisions for the dispensing of food, liquor, or for any service...shall withhold membership, its facilities, or services to any person on account of race, religion, or national origin....

* * *

The...position of plaintiffs is: 1) they assert that private persons have the rights...to associate in private with whom they wish...; *and that the State requires them* to sacrifice their practices of conditioning membership on an arbitrary discrimination, predicated on racial origin or color, *in order to sell alcohol.*

...*The* State of Maine has not...acted directly upon the activity of assembly as such.... Denial of the liquor licenses does not deny plaintiffs opportunity *to associate with whom they please.* The Elks lodges may continue to exist and arbitrarily to discriminate; they will, however, be unable to sell intoxicating liquors for beverage use.

The First Amendment and the Right to Petition

Are Sit-Ins Constitutionally Protected?

The right to petition the government was introduced in English law in 1215, when King John signed the Magna Carta. It was reaffirmed in the English Bill of Rights of 1689. One reason the American colonists rebelled in 1775 was that Parliament and King George III ignored a number of their petitions. Therefore, the Founding Fathers made sure that the right "to petition the government for a redress of grievances" was included in the First Amendment.

In the following case, the defendant was arrested and charged with trespassing for conducting a sit-in at the Presque Isle district office of Representative Olympia Snowe. His defense asserted his First Amendment right to petition the government.

State v. Armen

537 A.2d 11[illegible] (Me. 1988)

ROBERTS, J., joined by Chief Justice McKusick and Justices Nichols, Wathen, Glassman, and Clifford. Justice Scolnick dissented.

> Armen had been designated by the Maine Coalition for Peace and Justice in Central America to seek an appointment with Representative Snowe.... On at least one prior occasion he had been arrested at *Snowe's* district office by members of the Presque Isle Police Department....
>
> When Armen arrived at the district office on July 7, 1986, *he told Marion Higgins, the office manager* that he would be very reluctant to leave without progress toward arranging a meeting *with Rep. Snowe*, and that, if necessary, he would sit-in or remain in the office. When Higgins asked if he meant then, on that day, Armen replied that if necessary he would sit-in on that day....
>
> After further discussion with Higgins established that an eventual meeting was unlikely, Higgins asked Armen to leave. Armen refused. Higgins told Armen that she would have to call the police and have him arrested.... She advised Armen...that she felt his remaining in the office prevented her from doing her job....
>
> Two police officers...responded to a call from the district office. Armen told the officers that Higgins had asked him to leave and that he refused. The officers asked him to leave and Armen again refused. The officers then arrested Armen.
>
> ***
>
> Armen contends that the order to leave and his subsequent arrest violated his constitutional rights to petition and free speech.... In this instance, Armen's claim of constitutional violation fails. First, there is no evidence in the record that Higgins asked Armen to leave or that the police arrested Armen because of the content of his message.... The District Court...found...that Armen was ordered to leave and finally arrested because his presence interfered with the operation of the office, not because he conveyed a particular political message. Second,...Armen had concluded his business...before being asked to leave. Thus, any "restriction" came after Armen had exercised his rights.
>
> SCOLNICK, J., dissenting.
>
> I conclude that Armen was peaceably engaging in a constitutionally protected form of political expression when he refused to obey an order to leave his congressional representative's

field office, and therefore a criminal trespass conviction predicated on such refusal cannot stand.

***

As a constituent, Armen entered Rep. Snowe's office to make known his views regarding an important issue of the times... . The Court summarily dismisses Armen's claim that he was exercising his rights to free speech and to petition under our State and Federal constitutions... . The court concedes that Armen clearly expressed to Higgins his intent to conduct a sit-in if he was not allowed to arrange for a meeting with Rep. Snowe....

For at least two decades, peaceful demonstrations in the form of sit-ins have been a constitutionally acceptable form of civil protest... . The rights to free speech and petition are not confined to verbal expression, and certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence....

The court's suggestion that the evidence supports a rational finding by the District Court that Armen was not engaging in a recognizable form of speech when he quietly remained in the office is unfounded... . By staying in the office, he remained present for the purpose of engaging in First Amendment conduct in...demonstration of his opposition to Rep. Snowe's views on the Contra question... . In the context of this case, his silent presence conveyed a message clearly understood by Higgins and her colleagues... .

This record raises the question whether Armen was arrested and forcibly removed from Rep. Snowe's office because he was asking too many questions concerning a controversial issue... . Elected representatives and their employees...must expect and tolerate dissident expression. The right to communicate one's views to elected public officials is an essential part of our representative political system. This court should not affirm the criminal conviction of a citizen exercising this right.

THE SECOND AMENDMENT

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

- *Amendment II, United States Constitution*

Every citizen has the right to keep and bear arms, and this right shall never be questioned.

- *Article I, Section 16, Maine Constitution*

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Case text in italics indicates that we have inserted our language in place of the Court's language, for ease in reading.

*** Indicates that a significant portion of the Court's language has been omitted.

... Indicates that portions of a sentence or paragraph have been omitted.

Introduction

In colonial America, possession of guns was very common. Many people hunted—not primarily for sport, but to put food on the table. In the wilderness and on the frontier, nearly everyone had guns to fight or defend themselves against Indians whose land they were invading. American folklore made heroes out of frontier marksmen like Davy Crockett. In this context, individual ownership and use of guns was a given, which did not need to be ensured by a Bill of Rights provision.

On the other hand, Americans after the Revolutionary War did have two very strong fears which prompted them to include in the Bill of Rights a provision to guarantee the right of the people to bear arms not individually, but collectively, in state militias. The first was the fear of standing armies. The Americans had just fought a long and bloody war against the standing army of the British, whose permanent occupation of parts of America played a large role in the coming of the Revolution. After the Revolutionary War, Americans were prepared to tolerate a standing army only in extraordinary circumstances and with tight civilian control. During normal times, Americans felt safer relying on state militias.

The second major fear arose because of the power the federal government was given in the Constitution to control the state militias in times of national peril. The Constitution gave Congress the power to call out the state militias when needed for the defense of the nation and to organize, arm, and discipline them. That fear was that the federal government could misuse this authority, taking over the state militias. The Second Amendment was intended to protect the people against the potential tyrannical seizure of power by the federal government.

The Supreme Court has ruled that the Second Amendment does not establish an individual's right to bear arms for his/her individual purposes. Because of the collective nature of the right protected, the Amendment has almost never been used successfully to invalidate gun regulation laws.

While the United States Supreme Court has ruled that almost all of the amendments contained in the Bill of Rights apply to state governments, the Second Amendment remains applicable only to the federal government. The Maine Constitution, and the constitutions of many other states, protects citizens' right to bear arms, so that state government cannot disarm them. From 1819 until it was amended in 1987, Article I, Section 16 of the Maine Constitution read:

> Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned.

So worded, the Maine constitutional protection was limited in very much the same way as the Second Amendment. The Maine provision protected only the right to bear arms "for the common defense," as the Maine Supreme Court ruled in a 1986 case. At that time, a state law prohibited convicted felons from possessing firearms unless they had a state permit. The defendant, a convicted felon with a gun and no permit, argued that the Maine Constitution gave him an absolute right to own a gun. The Court disagreed, saying that the provision in the Maine Constitution did not apply because the defendant's possession of a gun had nothing to do with "the common defense."

In 1987, the people of Maine, by referendum, amended the Maine constitutional provision to do away with "for the common defense" language. As amended, Section 16 clearly establishes an individual right. Does that mean everyone, even convicted felons, have an absolute right to keep and bear arms?

The Maine Supreme Court has said no. Despite the very broad statement that "every citizen's right to keep and bear arms...shall never be questioned," the Court has ruled that the state and cities and towns can still enact "reasonable regulations" concerning the ownership and use of firearms. After all, could anybody seriously argue that the voters of Maine intended to allow inmates in the Maine State Prison or suicidal patients in state mental hospitals to have guns? The two cases which follow show the Court's thinking before and after the 1987 amendment.

"...For The Common Defense"

In 1986 a well-publicized convicted felon, Dennis Friel, was charged with possession of a shotgun and a revolver. State law required him to have a permit; he had none. Friel argued that the U.S. and Maine Constitutions protected his right to possess firearms. The Maine Supreme Judicial Court dealt with both questions.

State v. Friel
508 A.2d 123 (Me. 1986)

GLASSMAN, J., joined by Nichols, Roberts and Wathen.

The second amendment to the United States Constitution is simply inapplicable to the instant case. This amendment operates as a restraint solely upon the power of the national government and does not restrict the power of the states to regulate firearms. ...

We turn then to examine the Maine constitutional provision. Article I, Section 16 provides:

> Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned.

The right declared by section 16 is limited by its purpose: the arms may be kept and borne "for the common defense."...

The constitution also provides for an express grant to the Legislature of "full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution." The Legislature, by its enactment of section 393, reasonably determined that the common defense would not be served if a person, who by the commission of a felony had demonstrated a dangerous disregard for the law, possessed a firearm in the absence of a permit.

The defendant contends that the Legislature may not make this determination and points to the language in article I, section 16 guaranteeing the right to "every citizen" and providing that "this right shall never be questioned." We note that courts in other states with similar language in their constitutional provisions guaranteeing the right to keep and bear arms have rejected challenges, based on those provisions, to state statutes restricting or denying the possession of firearms by convicted felons. The constitutional guarantee must be interpreted in its entirety and in light of its purpose. We find nothing in the statute itself or in the facts of this case that infringes upon the purpose. We hold therefore that 15 M.R.S.A. section 393 on its face and as applied in the instant case does not violate article I, section 16.

"...And This Right Shall Never Be Questioned"

One year after the Friel decision, Maine voters, by referendum, amended Article I, Section 16 to eliminate the phrase, "for the common defense." In State v. Brown, decided in 1990, the Maine Supreme Judicial Court was once again confronted with a challenge to the law which prohibited convicted felons from owning guns. Brown, previously convicted of the felony of being an habitual traffic offender, obtained a gun and was charged with violating the "felon with a gun" statute. Brown argued that the 1987 amendment to the Maine Constitution absolutely guaranteed his right to own a gun, and the Legislature could "never question" that right. At the very least, he argued, no restriction should be placed on the right of one convicted of a nonviolent felony, such as himself, to own a gun.

At the trial, attorneys for the State argued that despite the wording of the amended provision, the Legislature and the people had intended to allow the State to continue to restrict the right of convicted felons to bear arms. In his ruling, the trial judge stated:

> Maine's right to keep and bear arms amendment is the most broad and least restrictive of any of the forty-three similar state amendments. ... If Maine legislators and citizens wanted to restrict or qualify the right to keep and bear arms in the manner that the State suggests, they could have enacted a constitutional provision that contained the desired restrictions. ... The draftsmen of the current right to keep and bear arms amendment used concise, plain language that contains no limitation or restriction of the type that the State contends the court should read into the constitution. The court may not change the wording of Article I, Section 16. The court must apply the amendment to the facts of the instant case by deriving the intent of the amendment from the language of the amendment itself. ...Simply stated, where the constitutional provision is clear and unambiguous, the court 'must apply the amendment and not construe it.'

The trial judge ruled that although, under the amended Constitution, the State could regulate **illegal** behavior (for example, an increased penalty for carrying a firearm during the commission of a crime), it could not prohibit a non-violent felon from merely possessing a firearm. The Supreme Judicial Court of Maine disagreed.

State v. Brown
571 A.2d 816 (Me. 1990)

MCKUSICK, C.J., joined by Roberts, Wathen, Glassman, Clifford, Hornby and Collins.

In 1987 the people of this state voted to amend article I, section 16, of the Maine Constitution to provide that "every citizen has a right to keep and bear arms; and this right shall never be questioned." By their vote the people struck four words, "for the common defense," from the original provision, with the apparent intent of establishing for every citizen the individual right to bear arms, as opposed to the collective right to bear arms for the common defense. The issue on this appeal is the constitutionality, after the 1987 amendment, of the criminal statute prohibiting the possession of a firearm by a convicted felon. That issue raises two questions: 1) Did the amendment create an absolute right to keep and bear arms, and 2) if it did not, does the possession-by-a-felon statute exceed the permissible bounds of reasonable regulation under the State's constitutional police power. We answer both questions in the negative.

Prior to the 1987 amendment the Maine Constitution afforded no absolute right to keep and bear arms and we now hold that no absolute right was created by the amendment. Both prior to and after its amendment, section 16 provided that the right to keep and bear arms "shall never be questioned"; the amendment to section 16 merely deleted the words "for the common defense." Before those four words were deleted, the section 16 right was not absolute, as declared by our prior case law, and the evident purpose of the amendment was merely to transform a collective right to bear arms into an individual right and nothing more.

The procedure for amending the Maine Constitution *provides that* ... the Attorney General, prior to submission of the question to the voters, "shall prepare a brief explanatory statement which shall fairly describe the intent and content of each constitutional resolution or statewide referendum that may be presented to the people." ...The explanation provided:

> The proposal would amend the Maine Constitution to establish a new personal right to keep and carry weapons, in place of the existing right to bear arms for the common defense. In proposing the amendment, several legislators formally expressed their understanding and intention that the proposed personal right, like the existing collective right, would be subject to reasonable limitation by legislation enacted at the state or local level.

...In the absence of a challenge to the Attorney General's official explanation of the amendment, we assume that the voters intended to adopt the constitutional amendment on the terms in which it was presented to them, including the interpretation that the individual right created by the amendment, like its predecessor collective right, is not absolute but rather remains subject to reasonable regulation by the legislature.

Our holding that amended section 16 does not vest every citizen with an absolute right to possess firearms also finds support in a common sense view of the context in which the voters of Maine adopted the 1987 amendment. Plainly, the people of Maine who voted for the amendment never intended that an inmate at Maine State Prison or a patient at a mental hospital would have an absolute right to possess a firearm. Once it is apparent, as common sense requires it to be, that amended section 16 does not bar some reasonable regulation of the constitutional right to possess firearms, the only remaining question becomes what are the outer bounds of reasonableness for the regulation of that non-absolute right.

...We now turn to the second question before us: Although the new individual right to keep and bear arms is not absolute, is the prohibition of the possession of a firearm by a person convicted of a "nonviolent" felony nonetheless unconstitutional because it is in excess of the State's police power? Our answer is no.

...It has long been settled law that the State possesses "police power" to pass general regulatory laws promoting the public health, welfare, safety, and morality. ... The police powers clause itself requires that the legislature's regulation of constitutional rights be reasonable. ...

Courts throughout the country have repeatedly found a rational relationship between statutes forbidding possession of firearms by any and all convicted felons and the legitimate state purpose of protecting the public from misuse of firearms. ...

Statutes prohibiting possession of firearms by a felon regardless of the nature of the underlying felony, have never been found constitutionally deficient. These statutes bear a rational relationship to the legitimate governmental purpose of protecting the public from the possession of firearms by those previously found to be in such serious violation of the law that imprisonment for more than a year has been found appropriate. The habitual motor vehicle offender who drives during his license revocation is a felon, having been recognized by the legislature of this State as having committed a Class C crime, a serious offense punishable by incarceration of up to five years. ...Defendant has demonstrated a disregard for the law to such an extent that, as applied to him, a legislative determination that he is an undesirable person to possess a firearm is entirely reasonable and consonant with the legitimate exercise of police power for the public safety.

THE THIRD AMENDMENT

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

- *Amendment III, United States Constitution*

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

- *Article I, Section 18, Maine Constitution*

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Introduction

The Third Amendment is sometimes called the forgotten amendment. Although considered critically important at the time of its inclusion in the Bill of Rights, it has seldom been called upon since its passage. The Third is an example of how the Constitution was designed by its authors not only to be an enduring document that would be relevant for generations to come, but also as one that would address specific concerns of the day.

Following the Boston Tea Party in December 1773, Parliament passed, and King George signed, a series of laws intended to punish the colony of Massachusetts. They were collectively referred to in the colonies as the "Intolerable Acts" since, as one colonist wrote, they were "downright and intolerably wrong." One of these laws, the Quartering Act, authorized royal governors to "quarter" or house royal troops wherever necessary, including private homes. The housing shortage in Boston was so severe that the redcoats were camping out on the Boston Common. In addition to being an outrageous invasion of privacy and imposing an unfair economic burden, this Act was seen by the colonists as one more confirmation that Parliament did not intend them to enjoy the rights of Englishmen; since the passage of Magna Carta in 1215 homeowners in England had been guaranteed sovereignty within their own homes.

In direct response to the Quartering Act the Third Amendment was adopted as part of the original Bill of Rights. After its grand beginning it seemed that it would never be heard from again. After almost 200 years without an appearance it was mentioned in passing in both Griswold v. Connecticut, 381 U.S. 479 (1965) and Katz v. United States, 389 U.S. 347 (1967) in support of the Court's decision that a right of privacy is inherent and fundamental in our system of law and government though not explicitly provided for in the Constitution. The Third Amendment was not directly interpreted and applied by any court until 1982 in the case of Engblom v. Carey, 677 F.2d 957 (1982).

Marianne Engblom and Charles Palmer were corrections officers at the Mid-Orange Correctional Facility in Warwick, New York. They lived, along with other corrections officers, on the grounds of the prison in dormitory-style housing provided by the state. Officers each had their own room and bath and shared common kitchen areas. They paid rent for this housing ($36/month) and did not maintain other homes.

In April of 1979 during a statewide strike, the corrections officers at Mid-Orange walked off the job. The governor of New York, Hugh Carey, called in the National Guard to maintain order at the prisons. At Mid-Orange, the striking officers were locked out of their living quarters so that the National Guardsmen could be housed there during the strike. Engblom and Palmer were among those locked out. They sued the Governor citing the Third Amendment as grounds for damages.

Since the Third Amendment had never been interpreted by a court before, the United States Court of Appeals had to answer several interesting questions for the first time. Under the Amendment what was a soldier? Was a National Guardsman included in the definition? Since National Guardsmen are state employees, does the Third Amendment even apply to this case? Could the dorm rooms of Engblom and Palmer be considered a "house?" What about the fact that Engblom and Palmer didn't own the place where they lived? After deciding that the guardsmen were "soldiers" and that the Third Amendment did apply to the states through the Fourteenth, the Court discussed the question of when a home was a "house" so as to be protected by the Third Amendment. It decided that Engblom and Palmer's residence arguably fit the definition, and sent the case back to the United States District Court, the trial court, for a full hearing on the Third Amendment issues. However, the District Court found that the State officials were protected from liability because they didn't know at the time they acted that their actions would violate the guards' Third Amendment rights and because they did not intend to harm the guards by their actions. The Court dismissed the case without deciding the Third Amendment claim.

It is highly unlikely that the Third Amendment will ever be widely used or ever come near to the importance it had at its inception. The changes in our society that have occurred since 1791 appear to have made it historically, but not presently, important. But it should not be completely written off. Given the unpredictability of events and the adaptability of the Constitution, we may yet see a reappearance of the Third Amendment.

Engblom v. Carey, Governor of the State of New York

677 F. 2d 957 (1982)

MANSFIELD, J., joined by Feinberg, C.J. Kaufman concurred in part and dissented in part.

We first address the novel claim based on the Third Amendment, a provision rarely invoked in the federal courts. We agree with the district court's conclusion that the National Guardsmen are "Soldiers" within the meaning of the Third Amendment and that they are state employees under the control of the Governor. Moreover, we agree with the district court that the Third Amendment is incorporated into the Fourteenth Amendment for application to the states.

The crux of appellants' Third Amendment claim depends on whether the nature of their property interest in their residences is sufficient to bring it within the ambit of the Third Amendment's proscription against quartering troops "in any house, without the consent of the Owner."

The Third Amendment was designed to assure a fundamental right to privacy. Griswold v. Connecticut, 381 U.S. 479, (1965). ...Since the privacy interest arises out of the use and enjoyment of property, ...an inquiry into the nature of the property-based privacy interest seeking protection becomes necessary. In closely analogous contexts rigid notions of ownership are not prerequisites to constitutional protections. When determining whether a legitimate expectation of privacy exists for the purposes of the Fourth Amendment *protection against unreasonable search and seizure*, for instance, the Supreme Court has rejected the notion that a protected privacy interest in a place must be "based *solely on ownership of* real or personal property."...Rather, the Court stated that "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy."

...A rigid reading of the word "Owner" in the Third Amendment would be wholly *contradictory* when viewed, for example, alongside established Fourth Amendment doctrine, since it would lead to an apartment tenant's being denied a privacy right against the forced quartering of troops, while that same tenant, or his guest, or even a hotel visitor, would have a legitimate privacy interest protected against unreasonable searches and seizures. ...Accordingly we hold that property-based privacy interests protected by the Third Amendment are not limited solely to those arising out of... ownership but extend to possession with a legal right to exclude others.

Applying these principles, as a matter of state law appellants throughout the strike had a lawful interest in their living quarters sufficient to entitle them to exclude others. Appellants' interest, moreover, reasonably entitled them to a legitimate expectation of privacy protected by the Third Amendment. Appellants' rooms, which they furnished and for which they were charged a monthly rent, were their homes. They did not maintain separate residences or have alternative housing available in the event of an emergency. During the entire two-year period preceding the strike, appellants did not reside in any other dwelling. These factors supporting the existence of a tenancy-type interest are reinforced by the Department's Directive and Rules, which repeatedly refer to the occupants as tenants and at one place to Mid-Orange as the equivalent of a landlord.

We conclude, therefore, that...*Engblom and Palmer* had a substantial tenancy interest in their staff housing, and that they enjoyed significant privacy due to their right to exclude others from what were functionally their homes. ...Accordingly, since we cannot say that as a matter of law appellants were not entitled to the protection of the Third Amendment, we reverse the summary dismissal of their Third Amendment claim.

THE FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

- *Amendment IV, United States Constitution*

The people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures; and no warrant to search any place or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause - supported by oath or affirmation.

- *Article I, Section 5, Maine Constitution*

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Introduction

Both the Fourth Amendment to the U.S. Constitution and Article I, Section 5 of the Maine Constitution guarantee to all citizens the right to be secure in their **person** (body), **house, papers** and **possessions** against unreasonable searches and seizures. They also guarantee that arrest and search warrants can be issued only upon "probable cause" that a particular offense has been committed.

A search warrant is a written order secured by the police and signed by a judge or magistrate. It authorizes the police officer to search for property that is believed to be evidence of a crime. A warrant can be issued only upon "probable cause" - a demonstration of facts, under oath, that would allow the judge to form a reasonable belief that a crime has been committed and that evidence would be found by the search.

In certain cases law enforcement officials can conduct a search without obtaining a warrant. For example, a warrantless search and seizure is lawful when it has been consented to by the victims of the search. Otherwise, a warrantless search will only be justified when emergency circumstances exist, for example:

- where evidence might be destroyed or a life lost unless there is an immediate search;
- a fugitive is fleeing and the police are in "hot pursuit;"
- the police have made a legal arrest and then conduct a search of the person arrested;
- an automobile has been stopped and probable cause exists for the belief that it contains illegal objects;
- evidence of a crime is in "plain view" of the law enforcement official, whether or not an arrest has been made.

In recent years, state courts and the U.S. Supreme Court have approved additional circumstances for warrantless seizures, such as roadblocks or "sobriety checkpoints." The courts have balanced the degree of intrusion on individual privacy interests against the governmental interest being promoted by the stop. In a one to two minute checkpoint stop, the court's view is that the minimal intrusion is outweighed by the strong governmental interest in protecting the public from drunk drivers.

Other new search and seizure issues include drug testing and electronic surveillance. For instance, the U.S. Supreme Court approved drug testing of federal employees without requiring probable cause in Treasury Employees v. Von Raab, 109 S.Ct. 1384 (1989). The employees were determined to be in public safety positions and therefore could be subjected to random drug testing by their federal employer to protect the public safety.

Evidence obtained in violation of the Federal or State Constitution usually cannot be used in a criminal prosecution. This is intended to discourage unreasonable searches by removing any incentive to violate the Constitution. Because of the exclusionary rule police officers are very careful to make certain that any evidence gathered is legally obtained. The exclusionary rule was first applied to the states in the U.S. Supreme Court case of Mapp v. Ohio, 367 U.S. 643 (1961).

Related to the exclusionary rule is the doctrine of the "fruit of the poisonous tree." This doctrine prohibits the use of evidence uncovered as the result of information learned during an illegal search. For example, if a defendant's personal address book is illegally seized and that book leads to a witness who provides damaging evidence, then that evidence would be banned from court as "fruit of the poisonous tree."

An exception to the "fruit of the poisonous tree" doctrine is the "independent source rule" which allows illegally obtained evidence to be used if it is also discovered independently of the illegal search and seizure.

In the address book example, if the defendant had later voluntarily disclosed the name of the witness, evidence given by the witness could be used against the defendant.

Courts are constantly presented with new situations in which they must balance the individual's right to freedom from unwarranted searches and seizures against the government's duty to investigate and prosecute crimes in order to safeguard all citizens. Some of the questions courts have had to answer are:

- Is it unreasonable for a school principal to search students or student lockers for drugs and narcotics?
- Can police officers search trash containers left on the street without obtaining search warrants?
- Does surgery performed to recover a bullet from the body of a criminal suspect constitute an unreasonable search?
- Can prison guards go through a prisoner's cell as part of a routine search for concealed weapons?

In many of these cases the court's determination will turn on whether the citizen who is the subject of a search had a "reasonable expectation of privacy." For example, in the case of New Jersey v. T.L.O., 469 U.S. 325 (1985), the U.S. Supreme Court found that the search of a female student's purse by a public school official was not unreasonable if there were reasonable grounds for suspecting the search would uncover evidence that the student has violated either a law or a school rule and the search was not "excessively intrusive." In T.L.O. the search revealed evidence of drug use. The Maine Supreme Judicial Court has not yet ruled directly on the issue of student searches.

In the more recent case of California v. Greenwood, 486 U.S. 35 (1988), the U.S. Supreme Court concluded that a warrantless search of an individual's sealed trash bags placed at the curb outside his residence for collection were not in violation of the Fourth Amendment. The majority of the court determined that placing the trash bags at the curbside for collection by the trash collector was the equivalent of depositing the garbage in "an area...suited for public inspection and (even) public consumption, for the express purpose of having strangers take it." Thus, the court concluded Greenwood could have no "reasonable expectation of privacy" in the bag's contents.

Maine Supreme Judicial Court cases which raise interesting search and seizure questions include the following:

- State v. Cloutier, 544 A.2d 1277 (Me. 1988). Did a police officer violate the defendant's reasonable expectation of privacy when he was able to view from the defendant's walkway the defendant cultivating marijuana in his basement? Answer: No.
- State v. Baker, 502 A.2d 49 (Me. 1985). Did a blood test administered by a registered nurse in a hospital setting constitute an unreasonable search? Answer: No.
- State v. Wentworth, 480 A.2d 751 (Me. 1984). Did a police officer's observation of a brass pipe and the butt of a hand-rolled cigarette in plain view on the dash board of a stopped car constitute an illegal search? Answer: No.
- State v. Garland, 42 A.2d 139 (Me. 1984). Are random stops of moving automobiles for purposes of identification and checking a driver's license and auto registration unreasonable under the Fourth Amendment? Answer: No.
- State v. Babcock, 559 A.2d 337 (Me. 1989). Is a police road block which stopped four cars at one time for 1-2 minutes to detect drunk drivers in violation of the Constitution? Answer: No.

- State v. Hope Ann Andrei, 574 A.2d 295 (Me. 1990). Did the seizure and reading of a defendant's diary violate the defendant's Fourth Amendment rights? Answer: No.
- State v. Dubay, 338 A.2d 797 (Me. 1975). Once a person has been legally arrested is it Constitutionally permissible to search and seize the contents of his wallet? Answer: Yes.
- State v. Gellers, 282 A.2d 173 (Me. 1971). Does it violate a defendant's Fourth Amendment Constitutional rights when an undercover agent gains entrance to his house by lying about his identity? Answer: No.
- Hatfield v. Com'r of Inland Fisheries, 566 A.2d 737 (Me. 1989). Is a river block stop of virtually all recreational canoe traffic and subsequent searches of persons and property of canoeists for contraband substances in violation of the canoeists' Fourth Amendment rights? Answer: Yes.

The decision in each of these cases rests upon a myriad of facts that must be balanced by the Court. In each of these Fourth Amendment cases the Court must struggle to balance the individual's right to privacy with the State's obligation to preserve the peace.

The Exclusionary Rule

What happens at trial when police seize evidence illegally? In a 1914 case, Weeks v. United States, the U.S. Supreme Court decided to exclude, or keep out of court, evidence that was found in an unconstitutional search. The "exclusionary rule" encouraged the federal government to use search warrants. But what happened in state courts? Even though the Fourth Amendment applies to searches and seizures conducted by state and local police, the states were not required to keep illegally seized evidence out of court.

In 1957 Dollree Mapp was convicted in state court of possessing obscene materials which were found, she contended, when police searched her house without a warrant. She asked the U.S. Supreme Court to apply the exclusionary rule to the states and to overturn her conviction. Her case was an important chapter in the story of the Supreme Court's effort to apply the Bill of Rights to state criminal justice systems.

Mapp v. Ohio

367 U.S. 643 (1961)

CLARK, J., joined by five justices. Black and Douglas concurred in separate opinions. Harlan, Frankfurter and Whittaker dissented.

> ...On May 23, 1957, three Cleveland police officers arrived at Dollree Mapp's residence in that city pursuant to information that "a person (was) hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home." Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance but *Miss Mapp*, after telephoning her attorney, refused to admit them without a search warrant. They advised their headquarters of the situation and undertook a surveillance of the house.
>
> The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this high-handed manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed *her* because she had been "belligerent" in resisting their official rescue of the "warrant" from her person. Running roughshod over *Miss Mapp*, a policeman "grabbed" her, "twisted (her) hand," and she "yelled (and) pleaded with him" because "it was hurting." *Miss Mapp*, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to *her*. The search spread to the rest of the second floor including the child's bedroom, the living room, the kitchen and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.
>
> At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. ...

The State says that even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial...

***

We hold that all evidence obtained by searches and seizures in violation of the Constitution is ... inadmissible in a state court. ...

***

...Our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. ...

***

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. ...

...Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement in entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice. ...

The Fourth Amendment in the Schools

Every school has rules to enforce discipline. From rules against being tardy, to rules regulating parking in school lots, to rules against smoking and drug use, schools could not operate without rules. How far may school officials go in searching students or their property in the course of enforcing school rules? If you get called down to the Assistant Principal's office for a school infraction, are you subject to a search? What about your purse? Your locker? Does it matter what the infraction is? Does the Fourth Amendment prohibition of "unreasonable searches and seizures" apply in school? Does a search in school require "probable cause" under the Fourth Amendment? Or even a warrant?

Although not all of these questions have been answered by the courts, the U.S. Supreme Court answered many of them in a 1985 decision that arose out of an incident that took place in a high school in New Jersey. Excerpts from the majority and dissenting opinions follow.

New Jersey v. T.L.O.
469 U.S. 325 (1985)

White, J., joined by Burger, Powell, Rehnquist and O'Connor. Blackmun concurred in the judgment. Brennan, Marshall and Stevens concurred in part and dissented in part.

...On March 7, 1980, a teacher at Piscataway High School in Middlesex County, N.J., discovered two girls smoking in a lavatory. One of the girls was the respondent T.L.O., who at that time was a 14-year old high school freshman. Because smoking in the lavatory was a violation of a school rule, the teacher took the two girls to the principal's office, where they met with Assistant Vice Principal Theodore Choplick. In response to questioning by Mr. Choplick, T.L.O.'s companion admitted that she had violated the rule. T.L.O., however, denied that she had been smoking in the lavatory and claimed that she did not smoke at all.

Mr. Choplick asked T.L.O. to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes, which he removed from the purse and held before T.L.O. as he accused her of having lied to him. As he reached into the purse for the cigarettes, Mr. Choplick also noticed a package of cigarette rolling papers. In his experience, possession of rolling papers by high school students was closely associated with the use of marihuana. Suspecting that a closer examination of the purse might yield further evidence of drug use, Mr. Choplick proceeded to search the purse thoroughly. The search revealed a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing.

Mr. Choplick notified T.L.O.'s mother and the police , and turned the evidence of drug dealing over to the police. At the request of the police, T.L.O.'s mother took her daughter to police headquarters, where T.L.O. confessed that she had been selling marihuana at the high school. ... *The State brought delinquency charges against T.L.O. T.L.O. was found delinquent and sentenced to a year's probation. T.L.O. claimed the search of her purse was illegal under the Fourth Amendment, and that the evidence should be excluded. On appeal, the New Jersey Supreme Court ordered suppression of the evidence found in T.L.O.'s purse.*

***

Having heard argument on the legality of the search of T.L.O.'s purse, we are satisfied that the search did not violate the Fourth Amendment.

In determining whether the search at issue in this case violated the Fourth Amendment, we are faced initially with the question whether that Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. We hold that it does.

...In carrying out searches and other disciplinary functions pursuant to *state* policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.

To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." ...On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

We have recognized that even a limited search of the person is a substantial invasion of privacy. ... A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.

***

How, then, should we strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place? It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. ... We hold today that school officials need not obtain a warrant before searching a student who is under their authority.

The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search. ... The accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the ... action was justified at its inception"; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive. ...

This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

The Court then held the search in this case met the standard of reasonableness, and therefore did not violate the Fourth Amendment.

BRENNAN, J., dissenting in part.

... Teachers, like all government officials, must conform their conduct to the Fourth Amendment's protections of personal privacy and personal security....

I do not, however, otherwise join the Court's opinion. Today's decision sanctions school officials to conduct full-scale searches on a "reasonableness" standard whose only definite content is that it is not the same test as the "probable cause" standard found in the text of the Fourth Amendment. In adopting this unclear, unprecedented, and unnecessary departure from generally applicable Fourth Amendment standards, the Court carves out a broad exception to standards that this Court has developed over years of considering Fourth Amendment problems. Its decision is supported neither by precedent nor even by a fair application of the "balancing test" it proclaims in this very opinion... .

Assistant Vice Principal Choplick's thorough excavation of T.L.O.'s purse was undoubtedly a serious intrusion on her privacy... *While I agree that a warrant should not be required for searches,* I emphatically disagree with the Court's decision to cast aside the constitutional probable cause standard...

STEVENS, J., dissenting in part.

... I would view this case differently if the Assistant Vice Principal had reason to believe T.L.O.'s purse contained evidence of criminal activity, or of an activity that would seriously disrupt school discipline. There was, however, absolutely no basis for any such assumption—not even a "hunch."

In this case, Mr. Choplick overreacted to what appeared to be nothing more than a minor infraction—a rule prohibiting smoking in the bathroom of the freshmen's and sophomores' building. It is, of course, true that he actually found evidence of serious wrongdoing by T.L.O., but no one claims that the prior search may be justified by his unexpected discovery. ... The invasion of privacy associated with the forcible opening of T.L.O.'s purse was entirely unjustified at its inception. ...

The "Plain View" Exception

Unless a person consents, a warrantless search can be justified only in emergency situations. The courts have defined the circumstances when a warrant is not required. For example, one exception to the requirement for a search warrant is when evidence of a crime is in "plain view" of the law enforcement official.

The Maine Supreme Judicial Court decided a case which turned on whether an officer was on the defendant's premises on legitimate police business when he observed an illegal activity which was in plain view. The case was decided on a 3-2 vote. Excerpts from the majority opinion and the dissent follow.

State v. Cloutier

544 A.2d 1277 (Me. 1988)

CLIFFORD, J., joined by McKusick and Wathen. Scolnick and Roberts dissented. (Nichols, J. retired before the opinion was adopted.)

...At about 8:00 p.m. on September 26, 1986, Ralph Sabins, a sergeant with the Oakland Police Department, was on patrol in the area of Lakeview Drive in Oakland. He received a complaint that a dog was barking in the area. Sabins investigated by cruising along Lakeview Drive, stopping his car at various places along the road to listen. During one such stop he stepped out of his car and started out on foot. He noticed a basement light on in the defendant's house, which was otherwise dark, and proceeded to walk up to the side door to see if anyone was home. Sabins testified... that he was drawn to the house because there had been recent reports of burglaries in the area and the light in the basement aroused his suspicion.

Sabins knocked on the side door but no one answered. As he walked down the steps from the side door he glanced into the basement window located at ground level to his immediate right. Without bending over or moving any objects in order to improve his view, he noticed several marijuana plants beneath a fluorescent light.

***

Whether Sabins' observations of the marijuana in Cloutier's cellar were searches within the meaning of the fourth amendment depends upon whether Cloutier entertained a reasonable expectation of privacy with respect to those activities. ...

We assume that Cloutier entertained some subjective expectation of privacy in the marijuana, yet we nonetheless conclude that because Officer Sabins was in Cloutier's walkway on legitimate police business when he made his observations, this subjective expectation of privacy was not one that society is willing to recognize as reasonable.

***

Having concluded that Officer Sabins was rightfully on the premises, and in view of the fact that he detected the contraband by means of his natural senses, without bending over or moving any objects to enhance his view, we necessarily hold that his observation of the marijuana was not a search for purposes of the fourth amendment. ... Because the marijuana was in the "plain view" of Sabins and anyone else present on the walkway, ...it was not subject to any reasonable expectation of privacy. ...

SCOLNIK, J., with Roberts, J., dissenting.

I respectfully dissent.

***

The Fourth Amendment prohibition against unreasonable searches and seizures does not allow a police officer to act on every "good faith" whim and enter on private residential property. Before he may do so, he must at least have an objectively reasonable justification for the incursion in order to come within the implied invitation of the property owner. ... Accordingly, because the officer had no legitimate basis for being on Cloutier's doorstep, his observations of the basement's interior constituted an unreasonable search in violation of the Fourth Amendment.

Roadblocks and the Fourth Amendment

In roadblocks, the police stop all the traffic at a certain point on the road. The police then ask the driver for license, registration, and perhaps other information. Police at roadblocks generally have their eyes out for evidence of violations of law other than simply driving without a license or registration. For example, roadblocks have become increasingly common as a result of public concern about drunk driving. Not all roadblocks are targeted specifically at identifying drunk drivers, but anyone who has been drinking who is stopped at a roadblock probably gets sweaty palms.

Are such roadblocks legal under the Fourth Amendment? After all, roadblocks involve stopping people even though there is no evidence they have done anything wrong. The United States Supreme Court recently considered this issue. Following are excerpts from the majority and dissenting opinions in this 6-3 decision.

Michigan Department of State Police v. Sitz

110 L.Ed. 2d 412 (1990)

REHNQUIST, J., joined by White, O'Connor, Scalia and Kennedy. Blackmun concurred in the judgment. Brennan, Marshall and Stevens dissented.

In 1986, a group of Michigan law enforcement officials established a set of guidelines for the operation of sobriety checkpoints. Under the guidelines, checkpoints would be set up at selected sites along state roads. All vehicles passing through a checkpoint would be stopped and drivers briefly examined for signs of intoxication. In cases where a checkpoint officer detected signs of intoxication, the motorist would be directed to a location out of the traffic flow where an officer would check the motorist's driver's license and car registration and, if warranted, conduct further sobriety tests. Should the field tests and the officer's observations suggest that the driver was intoxicated, an arrest would be made. All other drivers would be permitted to resume their journey immediately.

Under the first checkpoint, 126 vehicles passed through the checkpoint. ... The average delay for each vehicle was approximately 25 seconds. Two drivers were detained for field sobriety testing, and one of the two was arrested for driving under the influence of alcohol.

On the day before the operation of the checkpoint, *a group of Michigan drivers sued to prevent checkpoint operations... . They maintained that it was illegal to stop drivers without probable cause or at least reasonable suspicion... .*

A Fourth Amendment "seizure" occurs when a vehicle is stopped at a checkpoint... . The question thus becomes whether such seizures are "reasonable" under the Fourth Amendment. ...

No one can seriously dispute the magnitude of the drunken driving problem... . The intrusion on *motorists as a result of the roadblocks...* is slight... . The duration of the seizure and the intensity of the investigation *was* minimal... .

The Court next discusses the level of "fear and surprise" caused by encountering such an unexpected checkpoint. The "fear and surprise" to be considered are not the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint but, rather, the fear and surprise *caused* in law abiding motorists by the nature of the stop... . The circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion. ...

Moreover, the fact that the stops did not catch many people does not make them unreasonable....The choice among *alternative means for dealing with drunk driving* remains with the governmental officials who have a unique understanding of, and a responsibility for *limited money and police officers*.

In sum, the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the Fourth Amendment. ...

BRENNAN, J., dissenting.

In most *seizure* cases, the police must possess probable cause for a seizure to be judged reasonable. *Where the seizure is only a minimal intrusion*, the Government *should have to prove* that it had reasonable suspicion *of unlawful* conduct by the person "seized... ." Some level of suspicion *of unlawful conduct is essential to ensure the* protection the Fourth Amendment provides against arbitrary government action... . By holding that no level of suspicion is necessary before the police may stop a car for the purpose of preventing drunken driving, the Court potentially subjects the general public to arbitrary or harassing conduct by the police. ...

I do not dispute the immense social cost caused by drunken drivers, nor do I slight the government's efforts to prevent such tragic losses. Indeed, I would hazard a guess that today's opinion will be received favorably by a majority of our society. ...

But consensus that a particular law enforcement technique serves a laudable purpose has never been the touchstone of constitutional analysis. ...

STEVENS, J., dissenting.

A sobriety checkpoint is usually operated at night at an unannounced location. Surprise is crucial to its method. ... *Even the innocent will feel anxious as they approach a checkpoint*. Unwanted attention from the local police *is not only experienced by criminals*. Moreover, those who have found—by reason of prejudice or misfortune—that encounters with the police may become adversarial or unpleasant...will have grounds for worrying at any stop designed to elicit signs of suspicious behavior. Being stopped by the police is distressing even when it should not be terrifying. ...

The most disturbing aspect of the Court's decision today is that it appears to give no weight to the citizen's interest in freedom from suspicionless...seizures. ...

Unfortunately, the Court is transfixed by the wrong symbol—the illusory prospect of punishing countless intoxicated motorists—when it should keep its eyes on the road plainly marked by the Constitution. ...

Roadblocks and the Fourth Amendment: Two Maine Cases

Before the 1990 U.S. Supreme Court decision in Michigan Department of State Police v. Sitz, which approved roadblocks, or "sobriety checkpoints," Maine's highest court joined a majority of states in upholding roadblocks as constitutional. The issue was addressed and decided in State v. Leighton (Me. 1988), State v. McMahon (Me. 1989), and State v. Babcock (Me. 1989). The Court's reasoning was succinctly stated in State v. Babcock, and excerpts from that opinion follow.

State v. Babcock
559 A.2d 337 (Me. 1989)

COLLINS, J., joined by all justices.

Terry A. Babcock appeals his conviction of operating a motor vehicle with excessive blood alcohol or under the influence of intoxicating liquor...after the District Court denied his Motion to Suppress. We affirm.

We have recently held that an OUI roadblock will pass constitutional scrutiny provided that officer discretion is limited, the intrusion on individual privacy interests is minimized, and a strong governmental interest is promoted. In finding...roadblocks not constitutionally unreasonable, our balancing analyses revealed minimal intrusions on Fourth Amendment interests given the lower expectation of privacy traditionally accorded to the motoring public, and an "undeniably strong interest in protecting the public from the threat of drunk drivers on our highways." Our examination of the roadblock in the present case discloses that the same factors render it constitutionally reasonable. ...

The fact that the officers stopped four cars at a time, rather than every car...did not render the basis for the one to two minute detention arbitrary and capricious *and therefore unconstitutional.*

Less than a year after Leighton and a few months after Babcock, the Maine Supreme Judicial Court faced a similar issue with a unique twist. In Hatfield v. Commissioner of Inland Fisheries, the Maine Civil Liberties Union challenged state checkpoints stopping canoeists on the Saco River. Dubbed "riverblocks," these checkpoints involved stops by state wardens and troopers of all canoeists. Those stopped were questioned about drug and alcohol possession; in some cases their canoes and belongings were searched. Canoeists were detained 10 to 15 minutes. As many as 4,000 persons may have been stopped on each of the 3 dates of the operation, with no advance notice to the public. The Hatfields, who sued, were subjected to pat-down searches and their belongings were searched. No illegal drugs were found. They were detained about 20 minutes.

The Court found the riverblock procedure as practiced on the Hatfields to be unconstitutional. The State had admitted it had no probable cause to search the Hatfields, so the Court decided the case on that narrow ground. As a result, the Court left open the question of whether the riverblocks would be unconstitutional without searches, and tacitly invited the state to experiment with other, more limited, types of checkpoint procedures on the Saco.

Hatfield v. Commissioner
566 A.2d 737 (Me. 1989)

COLLINS, J., joined by all justices.

A plaintiff class composed of people who canoe upon the Saco River brought a class action before the Superior Court of Kennebec County challenging the constitutionality of a "riverblock" operation that was conducted jointly by the Department of Public Safety and the Department of Inland Fisheries and Wildlife on the banks of the Saco River on three weekend days in mid-1988. The officers at the riverblock operation stopped and questioned all canoeists on the Saco River without either probable cause or a reasonable and articulable suspicion that any individual canoeist was involved in criminal activity. In addition to this initial seizure and detention, some canoeists were subjected to intrusive searches of their persons or effects. ...The Superior Court held that the riverblock operation as conducted violated the Fourth Amendment of the Constitution of the United States and Article I section 5 of the Constitution of the State of Maine. We affirm. ...

Each checkpoint involved between six and ten law enforcement officers and one or two police dogs stationed at temporarily fixed sites on the riverbank east of the Route 5 bridge. All of the officers were armed, and the officers had the use of a privately-owned motorized airboat on each occasion. The police dogs, one of which was trained in narcotics detection, were sometimes allowed to roam freely in and near the shallow water at the edge of the river, often walking between and among the canoes being detained, and sniffing the canoes and canoeists present at the site. ...

The riverblock operations stopped all persons canoeing down the Saco River at the fixed checkpoint and detained the canoeists for periods ranging from a few minutes to 10 to 15 minutes or more to determine whether there were any safety violations apparent and whether there was any evidence of illegal activity with regard to alcohol and drugs. Approximately 1,000 to 2,000 canoes were stopped on each of the three dates. Generally the canoes held two persons, so as many as 4000 persons may have been subject to any one checkpoint operation. There was no advanced notice to the public of the riverblock operation. Canoeists typically had no warning of the checkpoint until they observed the officers on the riverbank several yards ahead. It was impossible for canoeists to avoid the checkpoints unless they abandoned their trip or stopped to camp upstream of the checkpoints. ...

Daniel and Jarlene Hatfield canoe frequently on the Saco River and were stopped at the riverblock on May 28, 1988. At the time that they were stopped, the Hatfields had approximately three cans of beer and no illegal narcotics or other drugs. The Hatfields were asked to display their flotation devices, and then were informed that they should surrender any drugs or illegal narcotics.

Daniel Hatfield was then asked to stand up and empty his pockets, and he was subjected to a search which included a pat down of his body and the pulling open of his waistband for inspection inside his shorts. Jarlene Hatfield was subjected to a search of her purse and camera case, both of which contained multiple zippered compartments. Three coolers and some of the plastic joint-compound buckets aboard the Hatfields' canoe were searched. ...The Hatfields were detained for approximately 20 minutes. ...

The State Defendants admit that the searches of the Hatfields' persons and effects were conducted without probable cause and therefore were unconstitutional. ...Nevertheless, the State Defendants declare that these unconstitutional searches were nothing more than "isolated incidents" or "departures" from normal, appropriate procedures. ...

We find the search of the Hatfields and their property relevant to this appeal. We review the constitutionality of the riverblock procedures as they were actually carried out in 1988, not as they might be carried out in the absence of admittedly unconstitutional searches.

...Because the riverblock operations as actually conducted in 1988 involved admittedly unconstitutional searches we find that they violated the Fourth and Fourteenth Amendments of the Federal Constitution and Article I section 5 of the Maine State Constitution.

THE FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

- Amendment V, United States Constitution

In all criminal prosecutions, the accused...shall not be compelled to furnish or give evidence against himself, nor be deprived of his life, liberty, property or privileges, but by judgment of his peers or the law of the land.

- Article I, Section 6, Maine Constitution

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof.

- Article I, Section 6-A, Maine Constitution

No person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury, except in cases of impeachment, or in such cases of offenses, as are usually cognizable by a justice of the peace, or in cases arising in the army or navy, or in the militia when in actual service in time of war or public danger. ...

- Article I, Section 7, Maine Constitution

No person, for the same offense, shall be twice put in jeopardy of life or limb.

- Article I, Section 8, Maine Constitution

Private property shall not be taken for public uses without just compensation; nor unless the public exigencies require it.

- Article I, Section 21, Maine Constitution

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Case text in italics indicates that we have inserted our language in place of the Court's language, for ease in reading.

*** Indicates that a significant portion of the Court's language has been omitted.

... Indicates that portions of a sentence or paragraph have been omitted.

Introduction

The Fifth Amendment is one of three, including the Sixth and the Eighth, which protect the rights of people accused of committing crimes. It contains what may be the best known of the constitutional rights of those accused of crimes: the right to remain silent. The Fifth also contains other rights: the right not to be tried for a crime unless a grand jury has decided that an adequate basis for trial exists; the right not to be tried twice for the same offense (double jeopardy); the right to "due process", which is a broad right to fair treatment by the government in civil as well as criminal matters; and the right not to have private property taken by the government for public use unless a fair price is paid.

In federal court, no person may be forced to stand trial unless a panel of citizens, known as a grand jury, has determined that there is enough evidence that a crime was committed and that the person was responsible, so that a trial should be held. The grand jury issues an indictment, naming the crime or crimes for which the accused must stand trial. (A grand jury does not determine guilt or innocence; that responsibility is left to the trial jury, also called the petit jury.) The right to indictment by a grand jury is not "fundamental;" that is, the duty to provide a grand jury imposed on the federal government by the Bill of Rights is not imposed on state governments. States may charge a crime in another manner. Of course states may, under their own constitutions, impose on themselves the same obligation as the federal government to provide a grand jury. Maine has done so. In Maine's Constitution, under Article I, Section 7, the right is similar to that found in the Fifth Amendment. In both the federal and Maine constitutions, this right specifically does not apply to members of the armed services on active duty.

The prohibition against double jeopardy ensures that no person can be forced to stand trial more than once for the same crime. This keeps the government from trying defendants repeatedly for crimes for which they have once been found not guilty. If a defendant appeals, asking for a new trial, the new trial is not double jeopardy, as the defendant has asked to be tried again.

The right not to be compelled to be a witness against oneself means that the government, in investigating and prosecuting crimes, must get its evidence from sources other than the suspect him/herself (unless of course the suspect gives evidence voluntarily). The right protects individuals from intimidation and abuse by law enforcement officials, who cannot compel suspects to "cooperate" in their own prosecution. The right against self-incrimination applies in court and in the process of investigation. Government law enforcement agents have an affirmative duty to be sure that people they deal with know their rights. Before the police question someone "in custody," — that is, someone who is not free to leave the police officer's presence — they must give the "Miranda warnings." The Miranda warnings do four things: they inform the person that s/he has the right to remain silent; they warn the person that anything said may be used against her/him in court; they inform the person that s/he has a right to an attorney (a Sixth Amendment right); and they tell the person that s/he has a right to have the government pay for an attorney, if s/he can't afford to pay. The warnings were established by the Supreme Court in the case of Miranda v. Arizona, 384 U.S. 436 (1966). That case declared that the right to remain silent is "fundamental;" it applies to states as well as to the federal government.

The "due process" clause of the Fifth Amendment has a parallel clause in the Fourteenth Amendment. Fifth Amendment due process applies only to the federal government, but the Fourteenth imposes identical due process requirements on the states. Due process by itself does not grant specific rights; rather, it requires federal and state governments to treat their citizens in fundamentally fair ways. Many of the specific rights of the Bill of Rights have been held to be "incorporated" in the concept of due process, because they have to do with fundamental fairness. The concept of due process guides many kinds of transactions and relationships between the government and citizens. A due process clause is also found in Section 6-A of Article I of the Maine Constitution.

Finally, the Fifth Amendment gives the federal government the power of "eminent domain," the ability to take private property, but it limits that power. The government may take private property only for a public use and only upon the payment of "just compensation," the fair value of the property. The Maine Constitution has a similar provision in Section 21 of Article I, which establishes the requirement of "public exigency" in addition to the requirements of "public use" and "just compensation." (These materials do not include cases on eminent domain issues. A separate set of materials on the Moody Beach case, called "For Whom the Bell Tolls," deals with these issues.)

Who Gets a Grand Jury?

The Fourteenth Amendment, added to the Constitution in 1868, laid a "due process" requirement on state governments. In language repeating the Fifth Amendment's limit on the power of the federal government, the Fourteenth provides: "...nor shall any State deprive any person of life, liberty, or property, without due process of law... ." Since 1968, courts have been engaged in interpreting this clause of the Fourteenth Amendment: just what is the "due process" that state governments must provide?

In a case decided in 1884, the United States Supreme Court decided that the Fourteenth Amendment did not mean that states had to provide a grand jury as part of the "process due" a person accused of a crime by a state government. States could instead charge by way of an "information," a non-jury process which in the Supreme Court's view adequately protected an accused. There was a vigorous dissent.

The Maine State Constitution says, in Article I, Section 7: "No person shall be held to answer for capital or infamous crime, unless on a presentment or indictment of a grand jury... ." In Article I, Section 6, the Maine Constitution provides that a person shall not be "deprived of his life, liberty, property or privileges, but by judgment of his peers or the law of the land." In Article I, Section 6-A, the Maine Constitution says: "no person shall be deprived of life, liberty or property without due process of law... ." In a case decided by the Maine Supreme Judicial Court in 1979, the lawyer for a juvenile charged with burglary argued that these provisions of Maine Constitution gave his client the right to a grand jury proceeding.

State v. Gleason
404 A.2d 573 (Me. 1979)

NICHOLS, J., joined by Pomeroy, Wernick, Archibald, Delahanty, and Godfrey. There was no dissent.

...Just before midnight on October 4, 1978, a Portland police officer, Douglas Cole, noticed certain suspicious circumstances at Nick's Variety Store in that city. He investigated and then radioed for assistance. This juvenile, Michael Gleason, was apprehended by another officer as he emerged from a window of that store. The proprietor of that store subsequently found that two six-packs of beer were missing from the cooler.

...On November 21, 1978, in Juvenile Court, this juvenile was adjudged guilty of the *burglary charge*. At the outset of the hearing his constitutional right to... have the matter first presented to a grand jury for possible indictment *was* argued in his behalf.

***

In our criminal justice system an indictment by a grand jury is not required of the states by the Federal Constitution. ...*By the same reasoning* we reject this juvenile's ... argument, that in our juvenile justice system an indictment by grand jury was constitutionally required *by the State Constitution* before there could be an adjudication hearing in this case.

The delay, formality, and complexity this would interject into the juvenile justice system, without appreciably enhancing the fact-finding process, militate against such a requirement.

Jeopardy to the goals of rehabilitation and treatment is a persuasive reason for not requiring a grand jury indictment before an adjudication hearing in the Juvenile Court.

We conclude that an indictment by a grand jury is not essential to due process for the youthful offender who may be brought into the Juvenile Court.

Double Jeopardy: The Government Can't Try Again

The Bill of Rights and the Maine Constitution guarantee that no one may be tried more than once for the same crime. If a defendant has been found "not guilty," the government may not constitutionally prosecute again on the same facts. But what happens if a trial goes so awry that the judge decides it's no longer "fair" and stops it, declaring a mistrial? And what happens if the reason for the mistrial is the behavior of the defendant and his own lawyer? That was the issue facing the Supreme Judicial Court of Maine in this case.

State v. Friel
500 A.2d 631 (Me. 1985)

ROBERTS, J., joined by Nichols, Viollette, Wathen and Glassman.

The indictment against Dennis Friel accused him of aggravated criminal mischief, *in that he had* damaged some thirty churches and one town hall in Androscoggin, Sagadahoc, and Cumberland Counties... . Andrews B. Campbell was appointed to represent Friel.

...*The* jury trial... began on September 10, 1984, in the Superior Court, Knox County. On behalf of Friel, Campbell moved for a mistrial on three occasions during the course of the trial. The court... denied the... motions... . Campbell made the last mistrial motion on the third day of trial, after Friel... had been found guilty of contempt of court, summarily sentenced to three days in jail, and removed from the courtroom.

After Friel was removed... Campbell left the courtroom and returned three times. His behavior prompted the court to warn Campbell... that *he* would be held in contempt of court if he did not desist from his disruptive activities... . Campbell refused to cross-examine a witness on his client's behalf... *and* then adopted as his own the decision to stand mute...*and* reconfirmed that the decision to stand mute was his own as well as his client's. On five occasions Campbell declined to cross-examine four State's witnesses, and, with the exception of making one objection, he refused to participate in... the trial after his client's removal... .

...*The* presiding justice called the State's attorney, the attorney for the co-defendant and a court reporter into *the justice's* chambers and announced his decision to declare a mistrial... . Neither Friel nor Campbell was present *or* consulted regarding the decision.

Subsequently, in open court the presiding justice announced that Campbell's *refusal to represent his client's interests in court* was in violation of the Code of Professional Responsibility, and created a manifest necessity for *a* mistrial order... . Campbell objected to the court order and reasserted that he acted pursuant to Friel's instructions and according to his best legal judgement... .

On December 12, 1984, Friel's case was rescheduled for trial. The defendant filed a motion to dismiss all charges on the ground of former *double* jeopardy.

***

Both the Federal and the Maine Constitutions protect persons in this State from being twice put in jeopardy of life or limb for the same offense. The guarantee against double jeopardy protects the right of an accused to have a trial completed by a particular tribunal. Despite this guarantee, the prohibition against double jeopardy usually will not bar retrial of the defendant if the defendant consented to the mistrial declaration. *Here... a*lthough defense counsel moved for a mistrial three times during the course of the trial, the court expressly denied the... motions. *Campbell had objected to the court order that actually declared the mistrial. Thus, there was no consent to the mistrial by the defendant.*

***

Even without the defendant's consent, the court may declare a mistrial without invoking the double jeopardy protection if it finds manifest necessity to take the case from the jury to preserve the public's interest in a fair trial. If the trial court has an alternative to declaring a mistrial, and that alternative protects both the rights of the defendant and the State, then manifest necessity cannot exist. *Here, a*lthough the defense attorney's actions were both 'shameful' and 'bizarre,' ... they did not require taking the case from the jury... . *The reason for the mistrial was* the ineffective assistance of counsel rendered by Campbell to Friel. The court assessed Campbell's assistance ineffective not because of his contemptuous behavior, but because of Campbell's announced decision to "stand mute."

***

We recognize that the trial court has an interest in conducting an orderly trial to maintain the integrity necessary to the proper functioning of the judicial system, but the court may not disregard important rights of the defendant.

We find no support for the proposition urged by the State that manifest necessity need not be shown when a mistrial results from conduct of the defense. *A defendant has a right to retain control over the course to be followed when defendant's counsel is removed or is not representing him. Here* the court did not consult defense counsel or the defendant before issuing the order. The court thereby denied the defendant any control of the proceedings. *Double jeopardy thereby prevents a second trial on these charges.*

Self-Incrimination: The Right Not To Be Your Own Worst Enemy

No evidence against an accused person is more persuasive than that which s/he gives against her/himself. The right not to incriminate oneself recognizes the impact of a confession or other admission that points to one's own criminal involvement or responsibility. The United States Supreme Court has stated the reasons for the right:

> The privilege against self-incrimination is, of course, related to the question of the safeguards necessary to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth. The roots of the privilege are, however, far deeper. They tap the basic stream of religious and political principle because the privilege...insists upon the equality of the individual and the state. ...One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.

The scope of the right is very broad. It protects a suspect or a defendant from giving testimony against her/himself in an investigation or at trial. And, its protections go further. The United States Supreme Court has said:

> The privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory...it protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used.

In 1966, the United States Supreme Court decided the question whether the right against self-incrimination applied to juveniles in juvenile proceedings. Justice Fortas' discussion in the opinion began with the observation: "It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children."

In Re Gault

387 U.S. 1 (1966)

FORTAS, J., joined by Justices Warren, Douglas, Brennan and Clark. Justices Black and White concurred separately. Justice Harlan concurred in part and dissented in part. Justice Stewart dissented.

***

Against the application to juveniles of the right to silence, it is argued that juvenile proceedings are "civil" and not "criminal," and therefore the privilege should not apply. ...The availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.

...It would be entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to "criminal" involvement. ...Juvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. ...In over half of the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult "criminals." ...Commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil."...

...*There* is little or no assurance...in most if not all of the States, that a juvenile...will remain outside of the reach of adult courts... . Juvenile courts *may* relinquish or waive jurisdiction to the ordinary criminal courts. ...

It is also urged...that the juvenile and presumably his parents should not be advised of the juvenile's right to silence because confession is good for the child as the commencement of the assumed therapy of the juvenile court process, and he should be encouraged to assume an attitude of trust and confidence toward the officials of the juvenile process. ...

...*E*vidence is accumulating that confessions by juveniles do not aid in "individualized treatment,"...and that compelling the child to answer questions, without warning or advice as to his right to remain silent, does not serve this or any other good purpose. ...

Further, authoritative opinion has cast formidable doubt upon the reliability and trustworthiness of "confessions" by children.

***

We conclude that the Constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults.

The Right To Be Told You Have Rights

The case of Miranda v. Arizona stands for the idea that you can't give up rights you never knew you had. Prior to Miranda, someone suspected or accused of a crime who did not ask for a lawyer, or insist that s/he had the right to remain silent, was treated as having given up (waived) these rights. In Miranda, the Supreme Court ruled that law enforcement officials had a duty to inform people before questioning them that they had a right not to answer and a right to have an attorney.

Police don't have to give Miranda warnings every time they have a conversation with a citizen, even if the conversation does relate to a crime. They have to exercise careful judgment in deciding whether the warnings are required, and hope they aren't wrong. In 1985, the Maine Supreme Court was faced with an issue concerning statements made to police by a juvenile suspected of murder. The defendant claimed his conviction was based on statements given while he was in the custody of the police when he had not been given the Miranda warnings.

State of Maine v. Thibodeau

496 A.2d 635 (Me. 1985)

NICHOLS, J.; Violette, Glassman and Scolnick concurring.

John Tower, *who was later found murdered*, had been reported missing by his brother...*on* October 27, 1983. That evening Trooper Ronald Graves, of the State Police, found Tower's automobile...parked near Route I-95 in Sherman. ... An investigation into the circumstances surrounding the abandoned vehicle and Tower's disappearance commenced the next morning, October 28. *Two witnesses gave information to the police that led them to identify the Defendant as the last person to have been seen with Tower.*

Sergeant Schofield, Trooper Graves and Trooper Dow...went to the Thibodeau apartment at approximately 8:00 A.M. on October 28 to speak with the Defendant, then barely eighteen years old. ... The officer's conversation with the Defendant took place in a kitchen area, with the Defendant's parents both present, and lasted for five to ten minutes. *At this time, the Defendant explained that, on the way to go hunting, he had gone for a "test ride" with Tower in a car Tower was attempting to sell and that Tower let him off at his house a little while later.*

That afternoon, the State Police went once again to talk to Thibodeau. They asked the young Defendant to accompany them and show them the route he had taken the day before. *By this time, although they had no proof of foul play, they were suspicious, and Thibodeau was their only suspect.* Nevertheless, no Miranda warnings were given.

When the youth complied with the officers' request and the three got into a two-door cruiser, they seated the young Defendant alone in the back of the vehicle. Instead of thereupon retracing the route taken on October 27, the asserted purpose of this second confrontation, once in the cruiser, he was driven to a side street where the two troopers talked with him for up to 40 minutes. *During the interview, Thibodeau changed his story in various ways, and the inconsistencies in his story were later used against him in his trial.* Only after this extensive questioning did the Defendant show the officers the route he claimed he had travelled. At one point during the drive he asked if he was a suspect; Trooper Porter responded that the Defendant was the last person to be seen with Tower. Thereupon the Defendant declared, "Well, I guess I am."

Four days later, after the body was discovered and other evidence against the Defendant was gathered, the Defendant was taken to the police station, given Miranda warnings, and made a statement that amounted virtually to a confession.

The Defendant argues that the statements he gave on the morning and afternoon of October

28 should have been suppressed because he had not been given Miranda warnings. Miranda requires warnings to be given if a suspect undergoes "custodial interrogation." We have found that "a person is in custody for the purpose of Miranda only when he is deprived of his freedom in some significant way, or would be led, as a reasonable person, to believe he was not free to leave the presence of the police."

We conclude that, *at the time of the morning meeting*, the officers were at that point conducting a general investigation of a missing person report. ...The police had no evidence at the time that *the missing person* had been murdered. Furthermore, the setting *of the morning interview was not coercive.* The Defendant was questioned in the kitchen of his own home with both of his parents present. The questions...did not delve into the details of the Defendant's knowledge. Therefore *the morning interrogation did not require Miranda warnings.*

The...afternoon confrontation...differed significantly. ... By the time the officers returned to the Thibodeau apartment *they* believed the Defendant had not been truthful in his morning account. Thus, the officer's suspicions had increased dramatically. ... When the Defendant left with the officers he had no idea, or, for that matter, cause to suspect, that he would be driven down a side street and interrogated in a parked cruiser. ... The Defendant was never told that he was free to leave, and, in order for him to have left the cruiser, an officer in the front would have had to open one of the doors and pull his seat forward. ... He was then and there deprived of his freedom in a significant way. ... *Therefore, Miranda warnings should have been given before this interview. The statements made should have been suppressed. The Defendant is entitled to a new trial.*

WATHEN, J., dissenting, joined by McKusick and Roberts.

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On both occasions when defendant was interviewed on October 28, the police were investigating a report of a missing person and had no evidence that Mr. Tower had been murdered. ...

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The ultimate inquiry in a case such as this is "simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."...The impairment in defendant's freedom of movement resulting from his location in the back seat, does not rise to the "degree associated with a formal arrest."

The afternoon interview was merely a continuation of the interview conducted at defendant's home in the morning. Defendant did not ask to leave the car at any point. ... The afternoon interrogation was neither prolonged nor accusatory in nature. ... *Therefore, Miranda should not have been required.*

THE SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

- Amendment VI, United States Constitution

In all criminal prosecutions, the accused shall have a right to be heard by himself and his counsel, or either, at his election;

To demand the nature and cause of the accusation, and have a copy thereof;

To be confronted by the witnesses against him;

To have compulsory process for obtaining witnesses in his favor;

To have a speedy, public and impartial trial, and except in trials by martial law or impeachment, by a jury of the vicinity.

- Article I, Section 6, Maine Constitution

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Case text in italics indicates that we have inserted our language in place of the Court's language, for ease in reading.

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... Indicates that portions of a sentence or paragraph have been omitted.

Introduction

The purpose of the Bill of Rights — to protect the individual against the power of the government — is dramatically evident in the Sixth Amendment. Here, as in the Fifth and the Eighth Amendments, the concern is for a particular individual: one accused of a crime. We are most likely to hear about these rights in press reports of sensational crimes; often it is claimed that they protect criminals at the expense of individual victims or of society as a whole. But Sixth Amendment rights protect each of us against government actions which are called "human rights abuses." At bottom, the Sixth protects the innocent. The Sixth Amendment, and its comparable language in the Maine Constitution, recognizes two quite simple realities. One reality is the government's power is uniquely awesome against one accused of a crime. Government is the apparatus of the criminal law: federal or state, the government charges, prosecutes, sentences, imprisons, fines, paroles, and pardons. The second reality is that when the criminal law is brought to bear the consequences are enormous. Mere accusation can ruin a reputation. Trial can turn a private life into a very public story. Conviction can mean imprisonment, probation, heavy fines; it can absolutely end access to certain jobs and to certain civil rights. For some federal crimes and in some states, though not in Maine, it can mean death.

In the face of these two realities, the Sixth Amendment insists upon fairness for the person accused. The Amendment is not a statement of grand, general principles. Rather, it is a catalog of explicitly stated guarantees and prohibitions which, summed up, seeks fairness in two ways: by establishing a fair tribunal in which the accused will be tried, and by ensuring that the accused can get the information and help needed to defend against the charges.

The fairness of the tribunal begins with the quickness with which the accused is brought to trial. The right to a speedy trial recognizes that delay in itself can be unfair. The accused may be in jail awaiting trial and thus deprived of liberty; the indictment or charge may severely trouble family life and work life; long drawn out anxiety may impair the ability to mount a defense. The right to public trial means that the apparatus of the criminal law must do its work in the full view of the people. The accused has a right not merely to a jury but to an impartial jury, whose members have no connection to the case and no feelings or viewpoints which would impair their objective evaluation of the evidence presented in court, and whose members represents a cross-section of the community where the crime occurred.

The ability to defend oneself begins with knowing what the charge is. An accused must "be informed of the nature and cause of the accusation." The law under which the accused is charged must clearly define the offense, and the accused must be told what action(s) led the government to charge him/her with the crime. The case against the accused will almost always involve the evidence of witnesses. Since they will be critical to conviction or acquittal, the accused has the right to meet them face-to-face and to cross-examine them. If a favorable witness is unwilling to testify, the accused has a right to a court order requiring the witness to appear and give evidence. Finally, a defendant has the right to a lawyer, not only to present the case in court but to advise and assist at every step of defense preparation.

In particular situations, one Sixth Amendment right may be on a collision course with another, or with rights protected by other amendments. For example, the requirement of public trial, interpreted to include press coverage, may jeopardize the right to an impartial jury: media coverage may, in effect, leave no persons impartial. Or the accused's right to public trial may run headlong into privacy rights of victims, witnesses and jurors. If confrontation poses a serious risk to a witness, the accused may be left with something less than a direct face-to-face meeting in court. For example, a witness who is a government informant may be hooded or disguised to conceal his/her identity; in child sexual abuse cases, videotaped testimony of child witnesses may be allowed. Presented with conflicting claims of rights, a court must decide whether one absolutely outweighs the other and, if not, must decide how to bring the protections at stake into balance.

Without the Fourteenth Amendment, the Sixth would apply only to the federal government, limiting and defining its powers only. In cases decided since the ratification of the Fourteenth Amendment in 1868, the courts have held that Sixth Amendment rights also affect the powers of state governments. These rights, called "fundamental" to our "scheme of ordered liberty," apply to state governments in the same manner as to the federal government.

In the cases which follow, the courts deal with issues arising under the rights given by the Sixth Amendment.

Make Haste To The Trial

Whether tried by the federal government or by a state, an accused person has a Sixth Amendment right to a speedy trial. The U.S. Supreme Court has ruled that "speedy trial" is a "fundamental" right, which means that the federal Constitutional right is basic to individual liberty and that the states must provide it in the same manner as the federal government. A state constitution may independently confer the same right; Maine's Constitution does. The right is held only by a person officially accused of a crime; there is no right to a speedy investigation.

The United States Supreme Court, in the case of Barker v. Wingo, 407 U.S. 514 (1972), laid down a relatively clear four-part test for determining whether the process of getting to trial has moved so slowly that the accused's Constitutional right has been violated. The factors to be considered are: (1) the length of the delay; (2) the reason for the delay; (3) the manner and timing of the accused's assertion of the right; and (4) actual harm to the accused in defending against the change. The first factor — the length of the delay — is a "triggering factor;" the others don't come into play unless the delay is long enough to strongly suggest the likelihood of harm to the accused. If the judge, weighing all the factors, decides that the accused's right has been violated, there is only one thing that can be done to remedy the violation: dismiss the charge.

In the case that follows, the United States Federal District Court for the District of Maine, which tries violations of federal laws, applies the Barker v. Wingo tests. The Court decides that the accused, who had been charged with possession of cocaine with intent to distribute it, had not been deprived of a speedy trial.

U. S. v. Veillette
688 F. Supp. 777 (D. Me. 1988)

CYR, Chief Judge.

Veillette was originally charged in 1982. In March 1987, the original indictment was dismissed "without prejudice," meaning that the government was free to charge Veillette again. Veillette was reindicted on the same charge in June 1987, just six days before the five-year deadline set by law, after which he could not have been charged with a crime committed in 1982.

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...Even though the cocaine charge is a serious and complex one...for which a relatively extended delay may have been warranted, the great delay in bringing the accused to trial on the cocaine charge clearly warrants consideration of the remaining criteria in Barker. *The court then considered the second factor, the reason for the delay, quoting from the Barker case.* "Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense could be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the accused. A valid reason such as a missing witness should serve to justify appropriate delay." *The court then found that while one reason for the delay weighs against the government, the accused bore more significant responsibility for the delay. He had requested continuances and had raised other procedural issues which had to be decided by the court. The court concluded,* in sum, the reasons for delay did not provide persuasive support for the accused's Sixth Amendment claim.... .

Turning to the next test, the manner and timing of the accused's assertion of his Sixth Amendment right, the court said, quoting another court... "a non-assertion of this right prior to trial indicates the accused may in fact have believed that the delay was to his benefit, in which case he should not be heard to complain at a later date that his right to a speedy trial has been violated"... . The court attaches considerable significance to the accused's failure to assert his speedy trial claim sooner than he did... . Thus, the third criterion in the Barker analysis weighs decidedly against defendant.

The court then applied the last Barker test: whether there had been actual harm to the accused from the delay. As regards prejudice *(harm)* to the accused, the Supreme Court identifies three interests which the right of speedy trial was intended to protect: "(i) to prevent oppressive pre-trial incarceration, (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." ... As for any additional anxiety and concern ... the facts that the accused was then serving a 14-year prison term on *a* marijuana conviction, and that he then faced the prospect of being prosecuted for failure to appear for sentencing, strongly suggest that the delay in the trial on the cocaine charge probably "created relatively little incremental strain on his life." ... Finally, the court finds that no oppressive pretrial incarceration resulted from any delay of trial on the cocaine charge since the accused was either at large, a fugitive, or serving a sentence of imprisonment during such period of delay. ...The court concludes on balance that the accused's sixth amendment speedy trial claim fails ... .

When Is It Too Trying To Be Tried In Public?

The requirement of a public trial is intended to assure that the government conducts criminal trials openly. History demonstrates that secret tribunals are often instruments of brutality and oppression. As one court said, "(t)he traditional Anglo-American distrust for secret tribunals has been variously ascribed to ... the Spanish Inquisition (and) the *English* Star Chamber." The right to a public trial acts as a safeguard against persecution by the state and restrains possible abuses of judicial power.

A criminal trial conducted in secret violates the due process requirements of the Fourteenth Amendment as well as the Sixth Amendment. Therefore, states are equally bound by the federal public trial requirement. The Maine Constitution also confers the right to a public trial.

If the presence of the public at a trial interferes with the fairness of the proceedings, the accused may assert that his rights of due process have been violated. In the following case, the Maine Court considers such an assertion, balancing the benefits of public trial against any unfairness to the accused. The "public" at the trial was a high school class.

State of Maine v. Beaudoin

386 A.2nd 731 (Me. 1978)

WERNICK, J., joined by McKusick, Pomeroy, Archibald, Delahanty, Godfrey and Nichols.

The trial justice, in the presence of the jury, welcomed a visiting high school class, permitting the class to attend the trial. The justice's remarks were brief general comments on the students' opportunity to learn about the judicial process. He spoke at the beginning of the trial, made no other reference to the class during the trial and there was no indication that the presence of the class caused any other interruption. Defendant's counsel objected to the trial justice about the presence of the class and, on appeal to the Maine Supreme Judicial Court, asked that the accused's conviction be reversed because the presence of the class and the justice's remarks may have prejudiced the jury. The Maine Supreme Court said, absent a showing of actual prejudice, the Constitutional guaranty of due process of law would be violated by the public's presence at a trial only if the surrounding circumstances be so extreme in nature and extent as to create the substantial and inherent probability that the trial cannot be fairly conducted. ...Ordinarily, that the public is present at a trial creates neither the danger nor the actuality of unfairness to the accused but rather tends to protect against it. ...We find nothing in the circumstances of this case to indicate that the presence of the high school class or the welcoming remarks by the presiding Justice had serious potential to, or actually did, adversely affect the conduct of the trial or its result.

The Impartial Local Jury: Familiarity, But Not Contempt

"Impartial local jury" has become a shorthand expression for the Constitutional right of one accused of a crime to be tried "by an impartial jury of the State and district wherein the crime shall have been committed." The right seems straightforward and clear, but the requirements of impartiality and "local-ness" may conflict. "Impartial" suggests that individual jurors are to be objective, free of knowledge or attitudes that would lead them to prejudge the case or to be prejudiced against the accused. "Local," however, suggests some degree of familiarity with the general setting and society in which the alleged crime occurred; thus, a "local" juror might be less objective. Those accused sometimes resolve these conflicting ideas themselves, by asking to be tried somewhere else when they fear that local jurors simply cannot be impartial.

The idea of impartiality goes beyond the individual juror. It also goes beyond the possibility of prejudice against an individual defendant in a specific case. The accused must also be protected against the possibility that a jury as a whole may not be impartial towards the type or kind of individual which the accused happens to be. The clearest example is that of race — an all-white jury, a black accused — but race isn't the only concern; gender and economic status, for example, are others. To ensure its impartiality as a whole, the jury must "represent a fair cross-section of the community." In the case that follows, several well-off defendants claimed that their right to an impartial jury (in this case the grand jury, not the trial jury) was violated because the jury did not include persons of lower socioeconomic class.

U.S. v. Abell

552 F. Supp. 316 (D. Me. 1982)

MAZZONE, District Judge.

The Court first considered whether the defendants could claim that their rights were violated because the jury did not include a type, or class, of persons different from themselves. These defendants were not members of the lower socioeconomic class which they argued was not represented on the jury. These guarantees of indictment and trial by a jury representative of a fair cross-section of the community do not lapse merely because the accused is not a member of the allegedly excluded class. Regardless of the gender, race, and other characteristics of the particular accused, a "fair-cross section" of the community must include members of all *recognizable* classes in the community. A grand jury *chosen from a panel of potential jurors* from which an identifiable group has been excluded does not represent such a fair-cross section, and any accused indicted before such a grand jury has been denied a fundamental right secured by the Sixth Amendment... .

Having decided that the defendants could claim the Constitutional right, the Court then considered whether that right had been violated. The Court set out the tests for determining whether a particular kind of juror had been excluded: (1) was the excluded group a "recognizable, distinct class;" (2) was the group proven to be unrepresented on the jury or under-represented in comparison to its proportion in the community's population as a whole; and (3) was the jury selection process susceptible of abuse or not neutral. The Court decided that the defendants had not met the first test. I am persuaded by the accuseds' testimony that there may be communities or circumstances in which groups sharing certain social or economic characteristics, such as a low level of educational attainment or blue-collar employment, are identifiable, cohesive and legally *recognizable* groups for purpose of the...Sixth Amendment... . ...However, I am not persuaded that any such lower socioeconomic class has been identified within the District of Maine. The defendants presented no testimony directed to the presence in this District of a group whose "attitudes or ideas or experience" are so particular as to render a grand jury from which they may have been excluded constitutionally infirm.

The Right To Know What You Did Wrong

The Sixth Amendment requires that an accused person "be informed of the nature and cause of the accusation." The accused must be told what law s/he is alleged to have violated. That law must clearly state what is prohibited. An accused must also be told what s/he did that led the government to charge a violation. The United States Supreme Court has ruled that an accused who does not have this information has been denied a fair trial, because s/he cannot prepare an adequate defense without it.

In the case that follows, a defendant charged with arson and conspiracy contended that the grammatically incorrect indictment was ambiguous and didn't adequately inform him of the charges against him.

State v. Corson

572 A.2nd 483 (Me. 1990)

WATHEN, J., joined by McKusick, Clifford, Hornby and Collins.

...An indictment has three Constitutionally based functions: (1) to provide the defendant with adequate notice of the charged offense so that he may prepare to defend against it; (2) to avoid unfair surprise to the defendant at trial; (3) to protect the defendant from twice being placed in jeopardy *(put on trial twice)* for the same offense. ...An indictment is considered sufficient if: a respondent of reasonable and normal intelligence, would, by the language of the indictment, be adequately informed of the crime charged and the nature thereof in order to be able to defend and, if convicted, make use of the conviction basis of a plea of former jeopardy... . *The sufficiency of an indictment should be determined*.. "on the basis of practical rather than technical considerations ...*p*roper grammatical construction...is not always indispensable." ...*T*he indictment in *this* case...even though grammatically incorrect, adequately informs the defendant... .

Confronting The Witness Against You:
The Right To Meet Head-On And To Ask Questions

The evidence given by witnesses — live persons testifying in court to the jury or to the judge — usually makes the most telling case against an accused. It's therefore very important to try to be sure that what witnesses tell is the truth. It's important from the standpoint of our legal system, which equates the establishment of the truth in court with the doing of justice by the court. It's also important from the standpoint of the accused, whose best defense is often to show that the evidence against him or her is false or unreliable.

Confrontation, in most cases, means that the accused has the right to be in the presence of those who give evidence against him/her. Witnesses must tell their stories in the face of the accused. In so doing, witnesses also tell their stories to the judge and/or jury who, in hearing the tale and seeing the teller, will decide if they believe what they hear.

The right to confront also means the right to cross-examine. Cross-examination — the questioning of witnesses by the accused or his/her lawyer — is intended to test witnesses' stories and their truth-telling capacity. It often tests both severely. The rigors of cross-examination, however, have a vital purpose: to "test the integrity, persuasiveness, motive, knowledge and truthfulness of the witness," in an attempt to ensure that the rigors of conviction will be experienced by only the guilty.

The right to confront almost always means that the witness must testify and be cross-examined while face-to-face with the accused at trial. Almost always. The United States Supreme Court has held that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." In its most recent confrontation case, the Supreme Court went on to say: "That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. ...(a) defendant's right to confront...may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." For example, a statement made by a witness who subsequently dies can be used as evidence at trial if the statement is shown to be reliable, even though the witness cannot be confronted. Government informants, whose life or family may be jeopardized if their identity is known, sometimes testify hooded or from behind a screen.

The two cases that follow deal with the right of confrontation in another set of circumstances: when the accused has been charged with child abuse and the witness is the alleged child victim. In deciding whether videotaped testimony meets the requirements of the Sixth Amendment right to confront, the Court considers the effect that facing the alleged abuser will have on the child and, indirectly, on the accuracy and reliability of the child's testimony. The first case is a decision of the Maine Supreme Judicial Court; the second is a decision of the United States Supreme Court. Both courts reach the same conclusion. For the opposite viewpoint, read the dissenting opinion of the U.S. Supreme Court justices who disagree.

State v. Twist
528 A.2d. 1250 (Me. 1987)

SCOLNIK, J., joined by Nichols, Wathen, Roberts and Glassman.

The State asked the Court to allow the testimony of two alleged child victims of sexual abuse to be videotaped. To persuade the judge to allow the testimony to be given on videotape, the State presented as a witness the children's foster father, who was also a child psychiatrist. He testified that when the children first came to live in his home they had spoken and "acted out" sexually about 95% of the time, that after about three months the frequency of this behavior started to decline, that after they testified before the grand jury they again began acting out sexually about 90% of the time, that it took another three or four months for this behavior to subside, that they *had been placed in court settings on other occasions and had "regressed" as a result, and that further regressions would be "horrendously difficult" for his family and he would not be able to continue to keep the children in his care as a foster parent. He testified that the children would suffer psychologically and emotionally if they were required to face the defendant while testifying about the alleged abuse. The foster father was cross-examined by the defense counsel. The Superior Court judge granted the State's request for videotaping, stating that "the emotional or psychological well-being of the witnesses would be substantially impaired if those witnesses were to testify at the trial." It ordered that the children's testimony be videotaped, that the defendant could observe the videotaping but would not be visible to the witnesses, and that the defendant's attorney could cross-examine the children on behalf of the defendant at the videotaping session.*

At the videotaping, the children and both attorneys were present. The defendant sat behind a one-way mirror through which he could see and hear the children as they testified; the children were not aware of his presence. The defendant was in constant communication with his attorney through a one-way audio hook up and he could view the videotape simultaneously on the television monitor behind the mirror. The videotaping was stopped on occasion so that the defendant and his attorney could discuss, outside the presence of the children, any objection they might have to the testimony. The children were placed under oath, asked some preliminary questions, and then cross-examined by the defendant's counsel.

The defendant...appeals from a judgment entered by the Superior Court convicting him of *several counts of sexual abuse and rape* involving five different children ranging in age from 5 to 17 years. He contends that...his rights to confrontation under the Maine and United States Constitutions were violated by the admission into evidence of videotaped testimony of alleged child victims of sex offenses.... He contends that this is so because he was not able to confront the children face to face when they gave their testimony at the videotaping session.

In this situation, where it was anticipated that the defendant would not retain the right to confront the children at trial, it was crucial that the setting in which the videotaping occurred simulated, as close as possible, a full-fledged hearing. ... Absent countervailing considerations, this would include affording the defendant his confrontation rights at the videotaping session itself; not just the right of cross-examination through competent counsel but the right to see and be seen by the witnesses, face to face. ...

We conclude, however, that countervailing considerations of public policy and the necessities of this particular case...warranted dispensing with direct, face to face confrontation between the defendant and the children at the time of the videotaping.... *I*t is clear that these children would have suffered severe psychological and emotional damage if they had been required to face the defendant.... *R*ecording the testimony of these children in this manner advanced the important public policy of protecting the emotional and psychological well-being of young children. ...

Our analysis of the Confrontation Clause issue in this case does not end here, however. *Since the children's testimony was "hearsay," it could only be accepted, under rules laid down by the Supreme Court, if the witnesses were "unavailable" for cross-examination at trial and if the testimony could be shown to be "trustworthy." The Court concluded that the testimony given by the foster father / psychiatrist that the children would suffer severe psychological distress was* clear and convincing evidence that the children's emotional or psychological well-being would be substantially impaired if they were to testify at trial. We conclude that this "psychological unavailability" satisfies the first...test. ...

Turning to the second...test, we must determine whether the children's testimony was sufficiently trustworthy or reliable.... *T*he videotape shows that the children understood the serious nature of their testimony and the requirement to tell the truth...*and* also clearly provides the viewer with the opportunity to observe the demeanor of the children as they testified. The defendant was present...watched and heard the children while they testified, was in constant communication with his attorney during the session, and through his attorney, effectively cross-examined the children. The trustworthiness...was reinforced by corroborating evidence presented at trial... .

We conclude that the children's videotaped testimony provided sufficient information...to assess its reliability.... It was therefore surrounded by sufficient guarantees of trustworthiness to satisfy the second...test.

After carefully reviewing the record in this case, we conclude that for the purposes of satisfying the requirements of the Confrontation Clause, it was not necessary for the defendant to physically confront the children face to face when they gave their testimony... .

Maryland v. Craig

58 USLW 5044 (1990)

O'CONNOR, J., joined by Rehnquist, White, Blackmun and Kennedy.

...*We* hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness...to testify at trial against a defendant in the absence of face-to-face confrontation... .

The requisite finding of necessity *is as follows*: the trial court must hear evidence and determine whether the use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child...*and* must also find that the child witness would be traumatized, not by the courtroom in general, but by the presence of the defendant.... Denial of face-to-face confrontation is not needed...unless it is the presence of the defendant that causes the trauma.... Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than... "mere nervousness or excitement or some reluctance to testify." ...

SCALIA, J., dissenting, joined by Brennan, Marshall and Stevens.

Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion.

According the Court, "we cannot say that *face-to-face* confrontation *with witnesses appearing at trial* is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers."... That is rather like saying "we cannot say that being tried before a jury is an indispensable element of the Sixth Amendment's guarantee of the right to jury trial." ...The reasoning is as follows: the confrontation clause guarantees not only what it explicitly provides for — 'face-to-face' confrontation — but also...cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the *videotape* procedure preserves the *rights of cross-examination, oath and observation of demeanor* (TRUE), which adequately ensure(s) reliability of evidence (perhaps TRUE); therefore the confrontation clause is not violated by denying what it explicitly provides for — 'face-to-face' confrontation (unquestionably FALSE). This reasoning abstracts from the right to its purposes, and then eliminates the right.

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...'To confront' plainly means to encounter face-to-face, whatever else it may mean in addition. And we are not talking about the manner of arranging that face-to-face encounter but about whether it shall occur at all. The 'necessities of trial and the adversary process' are irrelevant here, since they cannot alter the Constitutional text.

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Turning to the unavailability of the child witnesses, the dissenting opinion continues: The Court's test...requires unavailability only in the sense that the child is unable to testify in the presence of the defendant. That cannot possibly be the relevant sense. ...To say that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty.

Turning to the matter of the State's interest in protecting the alleged victims by not requiring them to testify in the presence of the defendant, the dissenting opinion continues: A child who *would suffer such serious emotional distress from confrontation that he cannot reasonably communicate* would seem entirely safe. Why would a prosecutor want to call a witness who cannot reasonably communicate?... Protection of the child's interest...is entirely within *the State's* control *by not calling the child as a witness at all.* The State's interest here is in fact no more and no less than what the State's interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one.

And the interest on the other side is also what is usually is when the State seeks to get a new class of evidence admitted: fewer convictions of innocent defendants... . The "special" reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by "special" reasons for being particularly insistent upon it in the case of children's testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality.

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...In the last analysis, however, this debate is not an appropriate one. I have no need to defend the value of confrontation, because the Court has no authority to question it. It is not within our charge to speculate that, "where face-to-face confrontation causes significant emotional distress in child witness," confrontation might "in fact disserve the Confrontation Clause's truth-seeking goal."... If so, that is a defect in the Constitution which should be amended by the procedures provided for such an eventuality, but cannot be corrected by judicial pronouncement... . For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it.

Compulsory Process: An Invitation That Can't Be Refused

The accused's right "to have compulsory process for obtaining witnesses in his favor" means that the court will order witnesses favorable to the accused to appear and testify on his/her behalf. The order is called a subpoena. Of course, witnesses may always testify voluntarily. Sometimes, however, they don't want to testify at all, and sometimes they're willing to testify but want to be able to say they did so because they were subpoenaed. The United States Supreme Court has said:

> The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging (cross-examining) their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

In the Maine case that follows, the defense had called and was about to present the testimony of a witness whose testimony might help the defendant by implicating the witness himself in the crime. The jury was sent out and the trial judge warned the witness that he risked incriminating himself by his testimony. "Warned" is perhaps too mild a term: the judge described, at length and vividly, the risk of self-incrimination and its consequences. As a result, the witness refused to testify at all.

State v. Fagone

462 A.2d 493 (Me. 1983)

WATHEN, J., joined by McKusick, Nichols, Roberts, and Violette.

The United States Supreme Court recently reversed a state court conviction because the trial judge had used such "unnecessarily strong terms" in warning a defense witness about the consequences of *his testimony* that he "could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify." ...

The standard to be derived *from the Supreme Court case* is that any practice that effectively deters a material witness from testifying is invalid unless necessary to accomplish a legitimate interest. ... We recognize the important interest in protecting a witness' right against self-incrimination, and we do not...hold that a trial justice cannot advise a witness of his rights when he reasonably believes that the witness may unwittingly incriminate himself. Warnings concerning the exercise of the right against self-incrimination, however, cannot be emphasized to the point where they serve to threaten and intimidate the witness into refusing to testify. ...

We conclude that the *trial judge's* remarks effectively "drove the witness off the stand," and thus deprived defendant of a fair trial and due process of law in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, sections 6 and 6-A of the Constitution of the State of Maine.

Right To Counsel: Making Sense Of The Process Due

United States Supreme Court Justice Sutherland, in the 1932 case of Powell v. Alabama, explained why assistance of counsel is so important:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every stage of the proceedings against him.

The Powell court confirmed the right to counsel in a "capital" case, that is, where an accused could be put to death if found guilty. In Gideon v. Wainwright, a 1963 case, the Supreme Court said that the right applied in non-capital cases also. ("Lawyers in criminal courts are necessities, not luxuries.") Then, in a 1964 case, Escobedo v. Illinois, the Supreme Court made it clear that the right to counsel arises when an investigation "turns accusatory," that is, when it is no longer a general inquiry but begins to focus on a particular suspect. In 1966, in Miranda v. Arizona, the Supreme Court held that suspects not only have rights, but also must know that they have them, and law enforcement officials have an obligation to tell them so.

As Justice Sutherland said, the right to counsel is the right to be advised and assisted "at every stage of the proceedings" and in all dealings with law enforcement officials and prosecutors. The following Maine case, which went all the way to the United States Supreme Court, raises the question of the right to counsel when law enforcement officials are not directly involved. In the case, two men were indicted for the same crimes. One confessed, agreeing to testify against Moulton and to otherwise help with the investigation and prosecution. He arranged with Moulton to meet to talk about the charges against them and their defense; Moulton, of course, did not know that his fellow defendant had confessed and was cooperating with police. The police, who knew of the planned meeting and its purpose, wired the cooperative defendant for sound, told him not to question Moulton, and sent him off. The two met, their conversation was recorded, and the recording was used as evidence at trial to convict Moulton.

Maine v. Moulton

474 U.S. 159 (1985)

BRENNAN, J., joined by Marshall, Blackmun, Powell and Stevens. Burger filed a dissenting opinion, joined by White and Rehnquist and joined in part by O'Connor.

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> Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. We have on several occasions been called upon to clarify the scope of the State's obligation in this regard, and have made clear that, at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.

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...The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. ...The Sixth Amendment is not violated whenever — by luck or happenstance — the State obtains incriminating statements from the accused after the right to counsel has attached. ...However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent. ...By concealing the fact that *the informant* was an agent of the State, the police denied *the defendant* the opportunity to consult with counsel and thus denied him the assistance of counsel guaranteed by the Sixth Amendment.

Right To Counsel: Making Sense Of The Process Due

The Sixth Amendment, and Article I, Section 6 of the Maine Constitution, establish the right to counsel in criminal prosecutions. Both constitutions also provide that "no person shall be deprived of life, liberty or property without due process of law." In the following case, the state of Maine went to court to take custody of a child away from her parents, who are alleged to have neglected her. The parents could not afford to hire an attorney and requested that one be appointed for them. The trial judge refused, deciding that because the custody proceeding was civil, not criminal, there was no right to counsel. The parents appealed to the Maine Supreme Judicial Court, which held that the Constitutional requirement of "due process" gave the right to counsel, regardless of whether the case was civil or criminal.

Danforth v. State Department of Health and Welfare

303 A.2d. 794 (Me., 1973)

POMEROY, J., joined by Weatherbee and Archibald; Dufresne and Wernick filed separate concurrences.

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The issue with which we are faced is: ...do indigent parents, *defending against an effort of the State to take custody of their minor child* have a right to counsel appointed by the court and provided at the State's expense? *The trial court had decided that there was no right to counsel, because the case was civil rather than criminal....*.

***

...The natural right of a parent to have custody of his children has constitutional dimensions, so we turn to the question whether the constitutional requirement of procedural due process can be satisfied without the appointment of counsel at the State's expense for an indigent parent whose right to raise his children is sought to be abridged by the State.

There is no single set of procedural safeguards that may be applied, as a standard of due process, in all judicial proceedings. Due process is a flexible concept, to be applied in any action in a manner which is meaningful and appropriate in terms of the nature of that proceeding, with the ultimate objective of guaranteeing fairness in all judicial actions.

***

There is flexibility of the due process concept in actions between the State and the individual. At one end of the spectrum of governmental-individual relations, it has been held that due process of law does not require a hearing "in every conceivable case of governmental impairment of private interests."...

At the other end of the spectrum of government-individual relations is, of course, the area of criminal prosecutions. In this area, the governmental action is limited by the strictest standard of due process. ...

As an action more nearly approximates a criminal prosecution, the demand for procedural safeguards increases. In any given action, the necessity of a particular safeguard is to be evaluated in light of the nature of the proceeding and by the nature of the interest upon which the government seeks to infringe.

...The need for a particular safeguard is not to be determined by the label fixed to the action in question.... The application of constitutional rights...is not based upon a distinction between civil and criminal cases. ...

In a neglect proceeding the full panoply of the traditional weapons of the state are marshalled against the defendant's parents. ...

The crucial issues in a neglect proceeding may be difficult to grasp and consequently difficult to refute for an uneducated and unsophisticated layman. ... The average parent would be at a loss when faced with problems of procedure, evidence, cross-examination. Statistical studies conducted at other jurisdictions indicated markedly different results between neglect proceedings where the parent has assistance of counsel and those proceedings where the parent is without counsel. ...

The neglect proceeding is accusatory inasmuch as a department is attempting to demonstrate that the parents' conduct has failed to measure up to a socially and legally acceptable norm. Indeed, testimony as to conduct resulting in a finding of neglect might also be the basis of criminal prosecution. ...

The fact that a parent is not fined or imprisoned as a result of a neglect proceeding does not make the prospect of the loss of the custody of one's child anything less than punishment in the eyes of the parent. ... That the State's objective is not penal but directed at providing a suitable home for the child has little effect on the position of the parent. In some instances the loss of one's child may be viewed as a sanction more severe than imprisonment.

It seems beyond the possibility of dispute that the Constitution of Maine recognizes this right of the parent to custody of his child and affords its protection.

...Where the interest sought to be impeached by the State is the natural and fundamental right of the parents to the custody of their children, the minimal requirements of procedural due process include the right to have counsel appointed at the state's expense, where the parents are indigent and desire such counsel.

Juvenile Justice: Constitutional Rights and Juvenile Wrongs

Children are generally seen by our society as persons under the care of adults, having different needs for protection and guidance. Parents, or their legal substitute, are responsible for children's safety, health, and well being. However, until the late 19th century, children who ran afoul of the law were tried and sentenced by the same processes as adults and were imprisoned with adults. Around 1899, reformers began to argue that the adult system was inappropriate for young offenders. They said that the job of the legal system should be to protect, correct, and rehabilitate the young. To this end, they said, a separate juvenile justice system must be created, to operate more simply, more flexibly, and more informally than the adult system.

Good motives, noble goals. However, as state juvenile systems developed, the question became: does greater simplicity, flexibility and informality mean fewer Constitutional rights? A number of cases in state and federal courts dealt with the question whether efforts to do right by juveniles had in fact done them wrong, by making Constitutional rights unavailable to them when they were accused of breaking the law.

Since the reform movement had succeeded in defining juvenile proceedings as "not criminal" the specific protections of the Sixth (and Fifth) Amendment did not apply. However, the Fifth and Fourteenth Amendments provided respectively that the federal and state governments "shall not deprive any person of life, liberty or property without due process of law." Many state constitutions, including Maine's, included the same language. The question for the courts was what the requirement of "due process" meant when applied to juveniles in juvenile proceedings. In the two cases that follow, the United States Supreme Court and the Maine Supreme Judicial Court decide whether "due process" means that certain rights found in the Sixth Amendment and in the Maine Constitution apply to juveniles in juvenile proceedings.

In Re Gault

387 U.S. 1 (1966)

FORTAS, J., joined Justices Warren, Douglas, Brennan, and Clark. Justices Black and White concurred separately. Justice Harlan concurred in part and dissented in part. Justice Stewart dissented.

> On Monday, June 8, 1964, at about 10 a.m., Gerald Gault and a friend, Ronald Lewis, were taken into custody by the sheriff of Gila County *Arizona*,... as a result of a verbal complaint by a neighbor of the boys, Mrs. Cook, about a telephone call made to her in which the caller or callers made lewd and indecent remarks.... At the time Gerald was picked up, his mother and father were both at work. *Not until Gerald's mother returned home at 8 o'clock, could not find him, and called the police, did she learn that Gerald was in custody at the Juvenile Detention Home. She was told that a hearing would be held in Juvenile Court the next day....*
>
> *The next day,* Gerald, his mother, his older brother, and *two probation officers* appeared before the Juvenile Judge.... Gerald's father was not there. He was at work out of the city. Mrs. Cook, the complainant, was not there. No one was sworn at this hearing. No transcript or recording was made. *Based on the judge's recollection of the hearing,* it appears that Gerald was questioned by the judge about the telephone call.... Gerald said only that he dialed Mrs. Cook's number and then handed the telephone to his friend, Ronald.... At the conclusion of the hearing,... Gerald was taken back to the Juvenile Detention Home. He was not sent to his own home with his parents....
>
> *As a result of the hearing,* the judge committed Gerald as a juvenile delinquent to the State Industrial School *until his 21st birthday.* Under Arizona law, no appeal *was* allowed in juvenile cases. *That law, and the proceedings by which Gerald was committed, are the basis for this appeal. ...*

Appellants urge that we hold the Juvenile Code of Arizona *unconstitutional as a denial of Gerald's following fundamental rights*:

1. Notice of the charges;
2. Right to Counsel;
3. Right to confrontation and cross-examination;
4. Privilege against self-incrimination;
5. Right to a transcript of the proceedings; and
6. Right to appellate review.

The issue here is: what are the due process requirements for juvenile delinquency proceedings?

***

There are differences between the procedural rights granted to adults and to juveniles. The original reason for juvenile proceedings, beginning in 1899, was to protect children from adult criminal courts, as a result of which they could be given long prison sentences and mixed in jails with hardened criminals. ...*Early reformers* believed that society's duty to the child *went beyond the question of guilt or innocence, and that the question should rather be*: "How can we best save him from a downward career?" The child - essentially good, as they saw it - was to be made "to feel that he is the object of *the state's* care and solicitude." ...The rules of criminal procedure were therefore altogether inapplicable, *and* ...(*t*)he idea of crime and punishment was to be abandoned. *The state was considered to stand* in loco parentis *(in the place of the parents), to protect the person of the child.*

***

The right of the state...to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty, but to custody." ... If his parents default in effectively performing their custodial functions ... the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled.

The Court observed that "the highest motives and most enlightened impulses" led to the creation of special systems for juveniles. However, the Court went on, the history of the juvenile court system had demonstrated the opposite. (*T*)he absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based on Constitutional principles has not always produced fair, efficient, and effective procedures. Departures from established principles of due process frequently result not in enlightened procedure, but in arbitrariness. *** Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and limits the powers which the state may exercise. ...Procedural rules which have been fashioned from the generality of due process...enhance the possibility that truth will emerge... . "Procedure is to law what scientific method is to science." *** Under our Constitution, the condition of being a boy does not justify a kangaroo court.

***

If Gerald had been over 18, he would not have been subject to Juvenile Court proceedings... *and* the maximum punishment would have been a fine of $5 to $50, or imprisonment in jail for not more than two months. Instead, he was committed to custody for a maximum of six years. If he had been over 18, ...*t*he United States Constitution would have guaranteed him rights and

and protections with regard to arrest, search and seizure, and pretrial interrogation. It would assure him of specific notice of the charges and adequate time ... to prepare his defense. *He would be entitled to be represented by counsel. If a confession were made, the State would have to prove that it was voluntary.* If the case went to trial, confrontation and opportunity for cross-examination would be guaranteed. *The difference between the rights accorded adult and child is here too great.*

***

The Court went on to rule that juvenile offenders who face the possibility of confinement in an institution were entitled as a matter of due process to the Sixth Amendment right to be told of the charge against them, the right to confront adverse witnesses as well as the accompanying right to cross-examine, and the right to counsel. They were also entitled to the Fifth Amendment right not to incriminate themselves.

State v. Gleason
404 A.2d 573 (Me. 1979)

NICHOLS, J., joined by Pomeroy, Wernick, Archibald, Delahanty, and Godfrey. There was no dissent.

....Just before midnight on October 4, 1978, a Portland police officer, Douglas Cole, noticed certain suspicious circumstances at Nick's Variety Store in that city. He investigated and then radioed for assistance. This juvenile, Michael Gleason, was apprehended by another officer as he emerged from a window of that store. The proprietor of that store subsequently found that two six-packs of beer were missing from the cooler.

....On November 21, 1978, in Juvenile Court, this juvenile was adjudged guilty of the *burglary charge*. At the outset of the hearing his constitutional right to a trial by jury and to... have the matter first presented to a grand jury for possible indictment *was* argued in his behalf. Three days later, he filed his appeal.

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The issues raised by the juvenile on this appeal require us to consider the fundamental principles governing constitutionally valid differences between juvenile proceedings and adult criminal proceedings. The validity of these differences is founded on the judicial recognition of the different goals and attitudes of society in response to the criminal behavior manifested by adults and juveniles.

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Without minimizing these ideals and goals, fundamentally fair procedures remain the primary and indispensable foundation of individual freedom, and must be employed in juvenile proceedings.... The procedural safeguards constitutionally required in adult criminal proceedings must be afforded a juvenile unless they would "compel the States to abandon or displace any of the substantive benefits of the juvenile process". Normal adult criminal procedures must be afforded to the extent consistent with the basic rehabilitative purpose of the juvenile justice system.

***

So long as rehabilitation remains the primary goal, and so long as it is not destructive to the fact-finding process, certain informality in the juvenile procedures is appropriate and simplified procedures in juvenile matters are a legitimate objective.

***

It is next urged on behalf of this juvenile that he was entitled to a jury trial.... No decision of the United State Supreme Court has held that the Due Process Clause of the Federal Constitution requires the states to provide jury trials in juvenile cases.... .

In this context we cannot say that the juvenile's interest in obtaining a jury determination outweighs the State's continuing interest in the existence of an independent and unique juvenile justice system. So long as Maine judges remain studiously aware of the unique nature of juvenile proceedings, the advantages to the juvenile of a jury determination are minimal indeed.

To import a jury requirement into Maine's juvenile justice system would not greatly strengthen the fact-finding function of the Juvenile Court, but would result in definite attrition of that court's ability to function in the informal and protective manner which has long been a goal of the system.... .

We conclude, then, that the benefits of non-jury proceedings under the Maine Juvenile Code are substantial, and that, just as the Due Process Clause of the Federal Constitution does not mandate jury trials for juvenile offenders, so the Due Process Clause of the Maine Constitution does not require that a jury sit as fact finders.... .

THE SEVENTH AMENDMENT

In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced; the party claiming the right may be heard by himself and his counsel, or either, at his election.

- *Amendment VII, United States Constitution*

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

- *Article I, Section 20, Maine Constitution*

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Case text in italics indicates that we have inserted our language in place of the Court's language, for ease in reading.

*** Indicates that a significant portion of the Court's language has been omitted.

... Indicates that portions of a sentence or paragraph have been omitted.

Introduction

The right to trial by jury in a non-criminal (civil) matter may date to William the Conqueror in the eleventh century, who introduced it as an alternative to trial by combat. The right was confirmed in the Magna Carta in 1215, when the English lords exacted a guarantee that disputes would be decided by a jury of twenty-five barons, rather than by the king or combat. American legal history is largely based upon the subsequent English development of jury practice, an influence that continues today.

In medieval England, there were two sources of power and justice: the Church and the State. Disputes resolved by church officials eventually evolved into what is currently deemed the "law of equity." The types of disputes handled by the church were decided without juries. The King's court developed what is now called "common law" and gradually increased the use of juries in these matters. Our American forefathers continued the practice in which one had a right to a civil jury only in certain types of disputes.

The American colonies all recognized and used civil juries to resolve disputes, but the types of disputes that entitled one to a jury varied from colony to colony, differences that continued after they became states. The U.S. Constitutional Convention did not include the guarantee to a civil jury trial. The omission was one of the arguments used by the anti-federalists to urge the defeat of the Constitution. Concern about the lack of this right was strong enough that the Seventh Amendment right to a civil jury was included in the Bill of Rights. Because jury practice varied from state to state and under English law, the amendment preserved unspecified rights and practices. The Seventh is one of the few Amendments that have not been applied to the states through the Fourteenth Amendment. However, 48 of the 50 states preserve the right as part of their state constitutions.

In interpreting the scope of the Seventh Amendment, the U.S. Supreme Court has taken a strictly historical view, with English practice prior to 1791. Maine has also adopted an historical approach to interpretation of its constitutional guarantee of a civil jury trial. The right was generally uncontested and uninterpreted for 150 years, but since 1973 there have been a number of cases in which the Maine Supreme Court has had to decide if the right applied to types of cases that may not have existed in 1820 when Maine became a state. The Court initially chose to focus on the nature of the case, rather than when the "cause of action," or "right to sue," was created. The Court shifted back to the historical approach in 1983, appearing to adopt a rule that a right to a civil jury existed if it could be shown that the right existed in a similar case prior to 1820. Finally, in 1989 the Court ruled that a right to civil jury trial existed unless it was shown that no right existed in similar cases prior to 1820. The 1989 case is important because it reaffirmed the historical approach used by the Court and created a presumption in favor of civil jury trials, which dramatically expanded the potential cases in which a jury could be had.

A Jury Then, A Jury Now

Defendant Vincenzo DePaolo was the owner of an adult bookstore in Portland. He was charged with the civil offense of selling obscene magazines; a rule of court procedure precluded him from asking for a jury trial. On appeal Mr. DePaolo argued that he had been deprived of his constitutional right to have a jury trial. The Maine Supreme Court agreed with him.

City of Portland v. Vincenzo DePaolo
531 A.2d 669 (Me. 1987)

GLASSMAN, J., joined by Nichols, Roberts, Wathen, McKusick, Scolnik and Clifford.

We confine our analysis of the jury trial issue at the constitutional level to article I, section 20 of the Maine Constitution, that provides in pertinent part:

> In all civil suits...the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced...

...In language plain and broad article I, section 20 guarantees to parties in all civil suits the right to a jury trial, except where by the common law and Massachusetts statutory law that existed prior to the adoption of the Maine Constitution in 1820 such cases were decided without a jury.

In view of the broad constitutional guarantee of the right to a jury trial in all civil cases, the question in this case is whether the exception stated in section 20 applies. We hold that it does not. Nothing in either the common law or in the statutory law of Massachusetts as they existed prior to the adoption of the Maine Constitution in 1820 indicates that defendants in a case such as the instant one would have been denied the right to a jury trial. The constitutional imperative— "In all civil suits...the parties shall have a right to a trial by jury"—squarely governs this case.

No Jury Then, No Jury Now

In In re Shane T., the trial court denied a jury to a man who was contesting the termination of his parental rights. Shane T. was three when his parents divorced. Although his father, George, was granted visitation rights, after three years of sporadic visits he stopped paying child support and made no further attempts to visit Shane. When Shane was eight his mother's husband petitioned to adopt him. Shane had lived with the husband since he was four and considered him to be his father. At this point George reappeared and contested the termination of his parental rights. He wanted a jury to hear his case.

In re Shane T.

544 A.2d 1295 (Me. 1988)

MCKUSICK, J., joined by Roberts, Wathen, Glassman, Scolnik and Clifford.

George first contends that the Probate Court's denial of his motions for a jury trial and for removal of the action to the Superior Court violated his constitutional right to a jury trial. Article I, section 20 of the Maine Constitution, in the same form today as when adopted in 1820, provides in pertinent part:

> In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced... .

Article I, section 20 guarantees parties in a civil suit the right to a jury trial unless at the time the Maine Constitution was adopted, the same or similar action was not tried to a jury. ... Although the specific action for termination of parental rights is a creature of recent statute, similar suits adjusting the relationship between parent and child were heard in equity without the intervention of a jury prior to 1820. As Justice Story explained in 1836: "...But whenever it is found that a father...acts in a manner injurious to *the children's* morals or interests; in every such case, the Court of Chancery will interfere, and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and take care of them, and superintend their education." ... Justice Story observed that suits to remove children from their parents' custody "*have* been acted upon in Chancery for one hundred and fifty years." ...Since prior to 1820 suits of the same general nature as the present action fell within the jurisdiction of the chancery courts and were not tried to a jury, George's contention that article I, section 20 guarantees him a jury trial here is refuted by historical fact.

Eviction: Let The Jury Decide

Ruth Merrithew lived at North School Congregate Housing in Portland. Her landlord claimed that she had violated her lease by disrupting the other tenants and went to court to have her evicted. Ms. Merrithew wanted a jury to hear her side of the story, but the District Court said she couldn't have a jury trial. On appeal, the Superior Court said the District Court had been wrong: Ms. Merrithew did have a right to a jury trial. When the landlord appealed this ruling, the Maine Supreme Court said they were both right. How could this be? After an extensive review of the history of the right to a civil jury trial in Maine, the Court ruled that there was a constitutional right to a jury trial in an eviction (forcible entry and detainer) case, but only on appeal. That is, the District Court would hear the case first without a jury, after which a defendant dissatisfied with the outcome could appeal and have a jury trial de novo in Superior Court.

North School Congregate Housing v. Merrithew
558 A.2d 1189 (Me. 1989)

HORNBY, J., joined by McKusick, Roberts, Wathen, Glassman and Clifford.

When a landlord uses Maine's Forcible Entry and Detainer (FED) statute to evict a tenant, is the tenant entitled to a jury trial under the Maine Constitution? The answer to that question requires a review of some 200 years of history. We conclude that, until the 1960's, jury trials were always available in suits of this general nature and that the Maine Constitution requires them to be available now.

We hold that a tenant has a constitutional right to a jury trial, but only after the District Court enters judgment.

The Maine Constitution provides now, as it did when adopted in 1820:

> In all civil suits, and in all controversies concerning property, the parties shall have the right to a trial by jury, except in cases where it has heretofore been otherwise practiced....

Art. I, section 20. A landlord's FED suit to evict a tenant is either a civil suit or a controversy concerning property. Accordingly, the Maine Constitution provides a right to a jury trial unless the exception— "where it has heretofore been otherwise practiced"—applies.

We have recently modified how we analyze the constitutional right to a jury trial to track more closely the language of article I, section 20. Specifically, our practice now is to find that there is such a right unless it is affirmatively shown that a jury trial was unavailable in such a case in 1820. ...If the identical cause of action existed in 1820, the answer of course is easy. The analysis, however, is not limited to such obvious cases. We also consider "suits of the same general nature" in 1820 to determine whether it was "otherwise practiced" at that time. ...

We turn then to the variety of early remedies available to a landlord seeking to evict a tenant when Maine adopted its constitution. The common law action of ejectment existed in Massachusetts during this period. It carried the right to a jury trial. Writs of entry of many variations also existed at common law in Massachusetts and were tried to a jury. At common law, forcible entry and detainer was also available to evict a tenant. A jury trial was available. In 1784, Massachusetts enacted a statute permitting a justice of the peace to issue a writ of restitution of the premises against those who "having a lawful and peaceable entry into lands or tenements, unlawfully and by force hold the same." ... The statute, known as a Forcible Entry and Detainer statute, specifically provided for a jury trial. In short, all the pre-1820 judicial procedures in this general area of eviction carried the right to a jury trial. ...

The Massachusetts statutory FED remedy, like the common law remedy, was available only in cases where a tenant held over by force. When Maine separated from Massachusetts in 1820 it reenacted the Massachusetts FED statute almost immediately, but with an important addition: Maine's FED remedy could also be used against any tenant who "shall unlawfully refuse to quit any house, land, or tenement" after his tenancy terminated and appropriate notice had been given. In other words, as of 1821 Maine's FED statute could be used to evict tenants who refused to leave even if there was no force, just as in this case. ... Like the Massachusetts statute on which it was based, this Maine statute also contained the right to a jury trial. Maine's current FED statute, under which this lawsuit was commenced, is simply the most recent successor to the 1821 statute. ...

We conclude that suit under Maine's modern FED statute to evict tenants who hold over peaceably are "of the same general nature" as the causes of action that carried the right to a jury trial in 1820. Thus, a jury trial is required under article I, section 20 because in the eviction of tenants prior to 1820 it had not "heretofore been otherwise practiced...."

***

In 1824, when jury trials were eliminated in FED cases before the justice of the peace, a party aggrieved could take an appeal from the final judgment of the justice of the peace to the Court of Common Pleas. An appeal to Common Pleas meant a *new* trial...with a jury. Thus, a jury trial was still available in an FED action, but at the next level of the court system.

***

Although we find a constitutional right to a jury trial, we wish to interfere as little as possible with the Legislature's assignment of jurisdiction to the District Court and its objective of making FED actions simple and speedy. We believe this can best be accomplished by adhering to the old statutory scheme contemplating a trial to judgment in the nonjury court first. (We took a similar approach when we found a right to jury trial in small claims proceedings.) In most FED actions, no more will be required; no appeal to the Superior Court for a jury trial will be necessary. Therefore, we hold that...the parties must proceed to judgment in the District Court before there is a right to appeal to the Superior Court for a *new* trial...with a jury.

THE EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

- Amendment VIII, United States Constitution

Sanguinary laws shall not be passed; all penalties and punishments shall be proportioned to the offense; excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.

- Article I, Section 9, Maine Constitution

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Case text in italics indicates that we have inserted our language in place of the Court's language, for ease in reading.

*** Indicates that a significant portion of the Court's language has been omitted.

... Indicates that portions of a sentence or paragraph have been omitted.

Introduction

Like the Fifth and Sixth Amendments, the Eighth Amendment deals with relations between the government and those accused and convicted of crime. Bail is a deposit of money or property by an accused; if s/he fails to appear for trial, the bail money or property belongs to the government. Bail supports the principle that a person is innocent until proven guilty: one accused of a crime should not be punished until guilt is proven at trial. Balanced against this principle is the public interest in having those properly accused brought to trial. The amount of bail therefore must be that which can reasonably be expected to assure that the accused will show up for trial, and no higher.

The Eighth Amendment, however, does not give an absolute right to bail. The government may define some crimes as unbailable. It may establish standards and procedures by which some defendants may be found ineligible for bail, either because no level of bail will assure their appearance for trial or because they are too likely to commit other crimes while out on bail.

The prohibition against excessive fines raises two issues: the ability of the defendant to pay, and the purpose of the law and the public interest sought to be protected by it. The fine must not be excessive in relation to either. The fine, however, is a punishment or penalty, so the fact that a defendant may find it very difficult to pay does not necessarily mean that the fine is excessive.

The Supreme Court has established standards for its application of the cruel and Unusual Punishments Clause of the Eighth Amendment: (1) Punishment cannot involve torture or be inordinately cruel. (2) Punishment cannot be disproportionate or excessive relative to the offense. (3) Punishment can be imposed only for bona fide criminal offenses. In Trop v. Dulles (356 U.S. 86, 1958) the Court said the clause draws its meaning from "evolving standards of decency that mark the progress of a maturing society." Thus, cruel and unusual punishment is a fluid concept in which the status of a particular punishment may change as society's values evolve and/or mature.

The dominant theme in recent years has been the clause's application to the death penalty. The constitutionality of the death penalty, the procedures by which it may be imposed, and actual methods of execution have all been examined by the Supreme Court. The Court held the death penalty to be unconstitutional in Furman v. Georgia (408 U.S. 238, 1972), because those with the authority to impose the sentence could exercise complete discretion over its terms, imposing the penalty in an arbitrary, discriminatory and capricious manner. In Gregg v. Georgia (428 U.S. 153, 1976), the Court declared that capital punishment was not unconstitutional per se and could be used where sufficient "structure" was provided for its imposition.

Maine has no death penalty, even for murder. When Maine separated from Massachusetts in 1820, the punishment for murder was death. Other capital offenses in Maine's history were rape, arson and burglary. In 1887 Maine's Legislature abolished the death penalty and established the punishment for murder as imprisonment at hard labor for life. Current law provides a sentence of 25 years to life for a person convicted of murder. Prison sentences have also been established for the other capital crimes. Indictment for a capital crime affects the right to bail.

Under the Cruel and Unusual Punishments Clause, the Supreme Court has reviewed sentencing policies and the operation of state and federal prison systems, including the adequacy of prison facilities and confinement conditions. The Court found, for example, that the practice of double-celling prisoners in a maximum-security state prison did not violate the clause.

Is There An Absolute Right To Bail?

The Maine Supreme Judicial Court has considered this question in two cases, Fredette v. State (428 A.2d 395, Me. 1981) and Harnish v. State (531 A.2d 1264, Me. 1987), which involved the crime of murder. In Fredette v. State, Nancy Fredette was convicted of murder and requested, pending her appeal, bail. Her request was refused and she appealed, charging violations of her Constitutional rights as well as raising state law issues.

The Court considered two Constitutional provisions, Maine's version of the Eighth Amendment in Article I, Section 9 and a provision unique to Maine, Article I, Section 10. First, Article I, Section 9 states that "excessive bail shall not be required." The Court said "we interpret this provision as providing only that where a defendant in a criminal prosecution must, or may, be admitted to bail, the bail shall not be excessive. It therefore casts no light on the problem of the instant case: whether, and in what circumstances, such a defendant may (or must) be admitted to bail. ..." The Court then stated, in a footnote, the U.S. Supreme Court's position on the right to bail: "This interpretation is in accord with the interpretation by the Supreme Court of the United States of the provision against "excessive bail" in the Eighth Amendment to the Constitution of the United States. As the Court said in Carlson v. Landon, 342 U.S. 524 (1952): 'The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept.' "

Thus, the Eighth Amendment does not confer the absolute right to bail. The states may write their own rules, either by Constitution or statute, defining the right to bail, and may exclude certain crimes as unbailable.

That is what Maine has done in Article I, Section 10. That section reads:

> No person before conviction shall be bailable for any of the crimes which now are, or have been denominated capital offenses since the adoption of the Constitution, when the proof is evident or the presumption great, whatever the punishment of the crimes may be. ...

The Court found that since murder was a capital offense at the time of the adoption of the State Constitution, there was no absolute right to bail before trial in a murder case. As regards bail after conviction of murder, the Court ruled that not only did the defendant not have a right to bail, but further, that the Superior Court lacks the power to allow bail.

In a later case, Harnish v. State (531 A.2d 1264, Me. 1987), the Court considered what standard of proof was necessary to deprive a person of his right to bail pending trial. Harnish was indicted for murder, and was denied pretrial bail. He argued the state could deny bail only upon "clear and convincing" evidence of his guilt. The Court disagreed: "We hold that Article I, Section 10 and established principles of due process require only a showing of probable cause to defeat Harnish's claim that he is constitutionally entitled to bail as of right." However, the indictment alone is insufficient to show probable cause. The evidence must be independently evaluated by the trial judge. This was done in Harnish's case, so the denial of bail was upheld.

When Is a Fine Excessive?

In State v. Briggs (388 A.2d 507, Me. 1978) Pamela Briggs was convicted of night hunting, fined $500, and sentenced to 3 days in jail. She was indigent and could not pay her fine. The Court considered whether the $500 mandatory fine was excessive, and said it was not, "given the substantial public interest *(preservation of game)* which such legislation seeks to protect as well as the presumption of constitutionality attaching to legislative enactments."

State of Maine v. Pamela Briggs
388 A.2d 507 (Me. 1978)

POMEROY, J., joined by Wernick, Archibald, Delahanty, Godfrey and Nichols.

Pamela Briggs was found guilty of nighthunting...following trial by jury. After judgment entered on the verdict, she timely appeals the imposition of the mandatory minimum sentence of three days imprisonment and a five hundred dollar fine. ...

It is undisputed that at the time of sentencing appellant was unable to pay the five hundred dollar fine. Moreover, she stated at the sentencing hearing that she would be unable to pay the fine even under an installment method. Accordingly, the mandatory minimum punishment was ordered.

***

We first address appellant's contentions regarding the excessiveness of the fine imposed. In State v. Lubee, 93 Me. 418, 45 A.520 (1899), this Court upheld the imposition of a fine on those catching short lobsters. The fine was equivalent to 250 to 500 times the value of the lobsters. The Court there stated that in determining whether a fine is excessive "regard must be had to the purpose of the enactment, and to the importance and magnitude of the public interest sought by *the fine* to be protected." Given the long standing interest our legislature has had in the preservation of fisheries, the fine in that case was not deemed to be excessive.

Similarly, in this case, the Legislature has long evinced interest in the preservation of game and, in particular, in prohibiting nighthunting. ... Given the substantial public interest which such legislation seeks to protect as well as the presumption of constitutionality attaching to legislative enactments,... we cannot find that the minimum fine imposed by statute is excessive.

What Constitutes Cruel And Unusual Punishment?

Maine provides no case in which a claim of cruel and unusual punishment has prevailed. In fact, the instances in which the claim has been made have drawn rather cursory treatment by the Maine Supreme Judicial Court, and no Maine case has made its way to the U.S. Supreme Court. Rather typical of the treatment afforded such claims by the Maine Supreme Court is that evidenced by the Court's opinion in State v. Reardon (486 A.2d 112, Me. 1984). Dennis Reardon was convicted of robbery and felony-murder and was sentenced to a 14-year prison term. In rejecting the claim of cruel and unusual punishment, the Court first noted that the test of cruel and unusual punishment requires an examination of societal standards: does the punishment "shock the conscience of society?" The Court's response in this case (and in most others raised in Maine): "By no means was the defendant in this case subjected to cruel and unusual punishment in violation of either the State or Federal constitution."

But suppose the punishment, not otherwise "cruel and unusual," is inflicted on a juvenile? State v. Wilson (409 A.2d 226, Me. 1979) addressed this question. Seventeen-year-old Paul Wilson was convicted of night hunting and given the statutory mandatory three-day jail sentence. He contended that a mandatory jail sentence was unconstitutional since he was a juvenile. In rejecting the defendant's position, the Court stated that the hunting ordinance was outside the jurisdiction of the juvenile court, depriving Wilson of any statutory right to special treatment as a juvenile and, further, that "this seventeen-year-old defendant has no constitutional right to special treatment as a juvenile."

State of Maine v. Paul G. Wilson

409 A.2d 226 (Me. 1979)

GLASSMAN, J., joined by McKusick, Wernick, Archibald, Godfrey and Nichols.

The defendant was convicted of night hunting...following a jury trial in the Superior Court, Knox County. After imposition of the mandatory sentence, the defendant, who was seventeen years of age at the time of the offense, appealed, challenging the statutory scheme which excludes the offense of night hunting from the jurisdiction of the juvenile court. We affirm the judgment.

Night hunting...is...outside the jurisdiction of the juvenile court even when that offense is committed by one who is a juvenile.

***

The legislature could rationally have concluded that a person under the age of eighteen who is guilty of night hunting is not in need of the rehabilitative processes of the juvenile court system. We find no constitutional infirmity in such a classification.

***

The appellant further argues that the mandatory three-day jail sentence ...constitutes cruel and unusual punishment when applied to a person under the age of eighteen. ... Since this seventeen-year-old defendant has no constitutional right to special treatment as a juvenile...*we* find no merit in the contention that this statute imposes a cruel and unusual punishment.

In another case involving a juvenile, the Maine Supreme Judicial Court upheld her conviction for criminal contempt and a sentence of seven days in county jail. The case was State v. DeLong (456 A.2d 877, Me. 1973), where Tammy DeLong, aged 15, was the alleged victim of sexual abuse by her stepfather. She refused to testify against him at trial, because she had "forgiven him for what he done to me." The Court, after appointing counsel for her, held a contempt hearing, found her in criminal contempt, and sentenced her to county jail for seven days. In a dissenting opinion, Justice Wathen found this sentence to be cruel and unusual punishment in violation of both the Maine and U.S. Constitution. He said the sentence had no redeeming value and flatly contradicted the benevolent purposes of the juvenile code. He found the sentence "abhorrent" and concluded: "I find it anomalous indeed that in this case of alleged sexual misconduct it is the young victim of that misconduct who now goes off to county jail."

State of Maine v. Tammy DeLong
456 A.2d 877 (Me. 1983)

CARTER, J., joined by McKusick, Violette and Wathen.

During a jury trial in Superior Court (Penobscot County), the presiding justice found the defendant in this appeal, Tammy DeLong, in direct contempt of court and sentenced her to seven days in the Penobscot County Jail. The defendant appeals the action of the trial justice. We deny the appeal.

Tammy DeLong, age 15, is the alleged victim of gross sexual misconduct and unlawful sexual contact by her adoptive father, Larry DeLong. Tammy DeLong testified on the State's behalf before the grand jury and at a hearing on a motion to suppress. On August 18, 1982, Tammy DeLong was subpoenaed to testify at Larry DeLong's trial. ...

Tammy DeLong stated to the justice that she would not testify. She gave the justice two letters, one written by her, explaining why she had decided not to testify, and one written by the DeLong family physician, recommending that she be excused from testifying to avoid further "emotional scars."...The justice then appointed counsel for her and again explained the consequences of her refusal to testify. ...

After an opportunity to consult with appointed counsel, Tammy DeLong was again called to testify. She adamantly refused to respond to questions and stated: "I don't want to testify because I love my father and I've forgiven him for what he done to me." The justice ordered her to answer the prosecutor's questions. After her continued refusal, the justice found her in direct criminal contempt of the court.

***

The justice...sentenced Tammy DeLong to seven days in the county jail.

***

The defendant, Tammy DeLong, challenges both the judgment of contempt and the sentence imposed. Although we agree with none of these contentions, we discuss each briefly. *Defendant first argues that the juvenile court has exclusive jurisdiction over juveniles accused of crimes, so the court had no power to hold her in contempt.*

***

We refuse to hold that a Superior Court justice who, in the exercise of his informed discretion, determines that a juvenile has willfully interfered with the business of the court, thereby impugning the court's dignity and authority, is without power to act.

***

The rehabilitative processes of the Juvenile Court...are unnecessary and irrelevant to vindicating the dignity of our courts.

***

Tammy DeLong argues that the court abused its discretion by sentencing her to seven days in jail. Punishment for criminal contempt is clearly within the sound discretion of the sentencing court. ...Because we find no abuse of that discretion, we will not disturb the justice's determination of an appropriate penalty for the contempt.

NICHOLS, J., dissenting.

I find it abhorrent to send this child to county jail.

The result which today's majority reaches is reminiscent of a long-ago day when children were regularly punished as adults and incarcerated with adults. The result suggests a return to "the dark world of Charles Dickens."

I find almost incredible the majority's assertion, unsupported by authority, that "The rehabilitative processes of the Juvenile Court...are unnecessary and irrelevant to vindicating the dignity of our courts."

A few jurisdictions have, against different statutory backgrounds, permitted trial courts to punish child witnesses for contempt. However, we live in a more enlightened day and in a state where the Legislature has enacted a Juvenile Code which in sweeping fashion ordains that exclusive and original jurisdiction over all "juvenile crimes" is vested, not in the Superior Court which asserted jurisdiction here, but in the Juvenile Court.

***

In the second place, I submit that sending this child to county jail violates the guarantees against cruel and unusual punishment provided by both the Maine Constitution and the United States Constitution. ...

In the light of the Legislature's mandate that the offenses of juveniles be dealt with according to the Juvenile Code, no one can gainsay that in this day it is "unusual" punishment to send a child to county jail. I suggest that, measured by "broad and idealistic concepts of dignity, civilized standards, humanity and decency," the incarceration of this girl is "cruel" as well as "unusual."

***

In the context of this case a sentence to jail has no redeeming value. On the contrary, such a sentence flatly contradicts the "benevolent purposes" of our Legislature in enacting Maine's Juvenile Code. ...

I find it anomalous indeed that in this case of alleged sexual misconduct it is the young victim of that misconduct who now goes off to county jail.

Is The Death Penalty "Cruel and Unusual" Punishment?

Gregg v. Georgia is generally said to have reinstated the death penalty in the United States. What the case actually did was hold that capital punishment was not unconstitutional per se, that is, always unconstitutional no matter what the procedural safeguards. The Court reviewed a Georgia statute that had been revised after Furman v. Georgia invalidated the state's former death penalty statute.

The Court said the new Georgia sentencing procedures limited the jury's discretion with legislative standards. The procedure was no longer arbitrary and capricious, the concerns expressed in Furman. Therefore, the death penalty sentence imposed on Gregg did not violate the Eighth Amendment. Justice Brennan, who wrote the Furman decision, but dissented in cases upholding the death penalty while he was on the Court because he believed it is cruel and unusual punishment in all circumstances, wrote a dissenting opinion.

Gregg v. Georgia

428 U.S. 153 (1976)

STEWART, J., joined by Powell and Stevens. Burger, Rehnquist, White and Blackmun concurred in the judgment and filed separate opinions. Brennan and Marshall dissented.

The issue in this case is whether the imposition of the sentence of death for the crime of murder under the law of Georgia violates the Eighth and Fourteenth Amendments.

***

We address initially the basic contention that the punishment of death for the crime of murder is, under all circumstances, "cruel and unusual" in violation of the Eighth and Fourteenth Amendments of the Constitution. ...

The Court on a number of occasions has both assumed and asserted the constitutionality of capital punishment. ...But until Furman v. Georgia...the Court never confronted squarely the fundamental claim that the punishment of death always, regardless of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual punishment in violation of the Constitution. Although this issue was presented and addressed in Furman, it was not resolved by the Court. Four Justices would have held that capital punishment is not unconstitutional per se; two Justices reached the opposite conclusion; and three Justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed. We now hold that the punishment of death does not invariably violate the Constitution.

***

The Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, "*t*he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."...Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment... . It requires...that we look to objective indicia that reflect the public attitude toward a given sanction.

***

The petitioners in the capital cases before the Court today renew the "standards of decency" argument, but developments during the four years since Furman have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.

***

In part, capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

***

We are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes. ...

The basic concern of Furman centered on those defendants who were being condemned to death capriciously and arbitrarily... . The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. ...In this way the jury's discretion is channeled. ...It is always circumscribed by the legislative guidelines. ...The concerns that prompted our decision in Furman are not present to any significant degree in the Georgia procedure applied here.

...We hold that the statutory system under which Gregg was sentenced to death does not violate the Constitution.

BRENNAN, J., dissenting.

In Furman v. Georgia...I read "evolving standards of decency" as requiring focus upon the essence of the death penalty itself and not primarily or solely upon the procedures under which the determination to inflict the penalty upon a particular person was made. I there said: "From the beginning of our Nation, the punishment of death has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries. It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime." That continues to be my view. ...

The fatal constitutional infirmity in the punishment of death is that it treats "members of the human race as nonhumans, as objects to be toyed with and discarded. (It is) thus inconsistent with the fundamental premise of the (Eighth Amendment) Clause that even the vilest criminal remains a human being possessed of common human dignity."...I therefore would hold, on that ground alone, that death is today a cruel and unusual punishment prohibited by the Clause.

Death Penalty For Teens?

Is the death penalty constitutional when applied to juveniles? The Supreme Court's answer depends on the age of the juvenile at the time the crime was committed. In Thompson v. Oklahoma, 108 S.Ct. 2687 (1988), the Court held the death penalty was cruel and unusual punishment for someone committing a capital offense while under age 16. But in Stanford v. Kentucky and its companion case Wilkins v. Missouri, 109 S.Ct. 2969 (1989), the Court said capital punishment for juveniles aged 16 or 17 when committing murder was constitutional. The Court looked to the history of capital punishment for juveniles and at the current state statutes to determine the "evolving standards of decency," and found no national consensus against the death penalty for 16 and 17 year olds. Therefore, the Court concluded by a 5-4 majority that this practice did not violate the Eighth Amendment.

Stanford v. Kentucky; Wilkins v. Missouri
109 S.Ct. 2969 (1989)

SCALIA, J., joined in part by Rehnquist, White, O'Connor and Kennedy. O'Connor concurred separately. Brennan dissented, joined by Marshall, Blackmun and Stevens.

These two consolidated cases require us to decide whether the imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age constitutes cruel and unusual punishment under the Eighth Amendment.

***

Neither petitioner asserts that his sentence constitutes one of "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted."...Nor could they support such a contention. At that time, the common law...theoretically permitted capital punishment to be imposed on anyone over the age of 7. ... In accordance with the standards of this common-law tradition, at least 281 offenders under the age of 18 have been executed in this country, and at least 126 under the age of 17.

Thus petitioners are left to argue that their punishment is contrary to the "evolving standards of decency that mark the progress of a maturing society."... In determining what standards have "evolved," however, we have looked not to our own conceptions of decency, but to those of modern American society as a whole. ...

Of the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders. This does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual.

***

Wilkins and Stanford argue, however, that even if the laws themselves do not establish a settled consensus, the application of the laws does. ... Petitioners are quite correct that a far smaller number of offenders under 18 than over 18 have been sentenced to death in this country. From 1982 through 1988, for example, out of 2,106 total death sentences, only 15 were imposed on individuals who were 16 or under when they committed their crimes, and only 30 on individuals who were 17 at the time of the crime. ...

Granted, however, that a substantial discrepancy exists, that does not establish the requisite proposition that the death sentence for offenders under 18 is categorically unacceptable to prosecutors and juries. To the contrary,...the very considerations which induce petitioners and their supporters to believe that death should **never** be imposed on offenders under 18 cause prosecutors and juries to believe that it should **rarely** be imposed.

***

We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment.

BRENNAN, J., dissenting, joined by Marshall, Blackmun and Stevens.

I believe that to take the life of a person as punishment for a crime committed when below the age of 18 is cruel and unusual and hence is prohibited by the Eighth Amendment. ...

Our judgment about the constitutionality of a punishment under the Eighth Amendment is informed, though not determined...by an examination of contemporary attitudes toward the punishment, as evidenced in the actions of legislatures and of juries. ...Currently, 12 of the States whose statutes permit capital punishment specifically mandate that offenders under age 18 not be sentenced to death. When one adds to these 12 States the 15 (including the District of Columbia) in which capital punishment is not authorized at all, it appears that the governments in fully 27 of the States have concluded that no one under 18 should face the death penalty.

***

There are strong indications that the execution of juvenile offenders violates contemporary standards of decency: a majority of States decline to permit juveniles to be sentenced to death; imposition of the sentence upon minors is very unusual even in those States that permit it; and respected organizations with expertise in relevant areas regard the execution of juveniles as unacceptable, as does international opinion. These indicators serve to confirm in my view my conclusion that the Eighth Amendment prohibits the execution of persons for offenses they committed while below the age of 18, because the death penalty is disproportionate when applied to such young offenders, and fails measurably to serve the goals of capital punishment. I dissent.

Prison Conditions: Cruel and Unusual Punishment?

In Lovell v. Brennan, the conditions at the Maine State Prison in Thomaston were reviewed by the federal district court in Portland in the early 1980's. The Court applied Eighth Amendment standards in reviewing the evidence of harsh conditions in facilities, staffing and programs in the prison. The general conditions were found to pass Constitutional muster, but the conditions in "restraint cells" or solitary confinement for disruptive prisoners were found to violate the cruel and unusual punishment clause.

Prisoner advocates in the State of Maine brought a class action lawsuit against the Governor, the Commissioner of Corrections, and the Warden of the Maine State Prison at Thomaston charging that conditions at the prison violated the U.S. and Maine Constitutions. The litigation spanned several years, and included numerous hearings both at the prison and at the federal district court in Portland. Twice during the 1979-1980 hearings, Judge Gignoux, the federal judge presiding in the case, toured the prison with counsel to examine prison conditions first-hand.

Prior to the final arguments by counsel in the case, the State instituted a prison lockdown in April 1980. Following the lockdown, a new warden was appointed and substantial improvements were made in the physical plant, staffing and programs at the prison. The prisoners' counsel asked for and received permission to reopen the record to further evidence. New hearings followed. Attempts to negotiate a consent decree broke down and final, comprehensive arguments on unresolved issues were submitted to the Court. Judge Gignoux toured the prison a final time with counsel in November, 1982.

The Court's decision in this case, affirmed by the 1st Circuit Court of Appeals (728 F.2d 560), carefully analyzed the prison conditions complained of by three groups of prisoners: the general population inmates, those inmates confined to administrative segregation, and those inmates confined in protective custody. All charged violations of the Eighth and Fourteenth Amendments to the U.S. Constitution and the comparable provisions of the Maine Constitution. The Court noted that conditions had improved considerably by the fall of 1982, and said "it is clear that this litigation in large measure has sparked the improvements made." The Court found that the improved conditions did not constitute cruel and unusual punishment, but that conditions of "restraint cells" in the administrative segregation unit for confinement of disruptive inmates were so inhumane as to violate Eighth Amendment standards.

Lovell v. Brennan
566 F.Supp. 672 (D.Me. 1983)

GIGNOUX, Chief Judge.

The main thrust of the...claims of the general population plaintiffs is that defendants have subjected them to cruel and unusual punishment in violation in the Eighth Amendment... . Specifically, plaintiffs allege that violence within the prison is unreasonably excessive and uncontrolled; that living and working conditions at the prison do not provide reasonable shelter, sanitation and safety; and that the lack of meaningful vocational, educational and recreational programs results in pervasive and debilitating idleness for the prisoners. ...

In Rhodes v. Chapman, decided since the institution of this litigation, the Supreme Court considered for the first time the limitations that the Eighth Amendment's ban on inflicting cruel and unusual punishment imposes upon the conditions in which a state may confine those convicted of crimes. Rhodes makes clear that "the Constitution does not mandate comfortable prisons."

...The Court in Rhodes announced a three-pronged test; the Eighth Amendment prohibits conditions, viewed under "the contemporary standard of decency": (1) which "involve the wanton and unnecessary infliction of pain"; (2) which are "grossly disproportionate to the severity of the crime warranting imprisonment"; or (3) which, alone or in combination, deprive inmates of "the minimal civilized measure of life's necessities."

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This Court is governed by and has applied the foregoing principles ... in assessing plaintiffs' claims that the conditions of their confinement at MSP violate the Eighth Amendment.

***

The conditions of confinement at MSP are unpleasant, if not harsh. Prior to the April 1980 lockdown, living conditions at the prison may well have been below minimum standards. Nevertheless, the evidence in this case does not support the conclusion that the current living and working conditions at MSP fail to meet the requirements of the Eighth Amendment. ...

MSP is an antiquated facility which is hardly a credit to the State of Maine. Nevertheless, the basic human needs of the inmates—reasonably adequate shelter, sanitation, food, clothing, personal safety, and medical care—are being met. The Eighth Amendment requires no more.

***

Plaintiffs contend that the three Restraint cells (known by inmates as the "hole") in the Administrative Segregation Unit are not fit for human habitation and that their use by defendants is constitutionally impermissible. The Court agrees that the condition and use of these cells is so inhumane as to violate Eighth Amendment standards.

The three Restraint cells are located on a separate corridor in the Administrative Segregation Unit. They are totally unfurnished. Each cell has three bare concrete walls and a concrete floor. The front of the cell is steel bars. Beyond the bars is a small vestibule and a solid steel door broken only by a small opening covered by a metal flap. There are no windows in these cells. The only light is outside each cell in the vestibule area and cannot be controlled by the occupant. A hole in the concrete floor (known as a "Chinese toilet") serves as a toilet.... There is no heat in the cells, and ventilation is virtually non-existent. Inmates are placed in the cells naked. They are often not provided with bedding or basic hygienic materials. The evidence discloses that the duration of confinement in these cells has ranged from several hours to several days. ...

Defendants contend that the Restraint cells are only used to house suicidal and uncontrollable inmates and that they are a necessary prison management tool. ...Conditions such as those disclosed by the record in *this* case have been vehemently condemned by the courts...as so barbaric and uncivilized as to transgress the Eighth Amendment ban on cruel and unusual punishment. ...

The evidence is overwhelming that the manner in which defendants have used the Restraint cells for confinement of disruptive inmates at MSP has been so inhumane and so violative of minimal concepts of decency as to violate the Eighth Amendment.

***

THE NINTH AMENDMENT

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

- Amendment IX, United States Constitution

The enumeration of certain rights shall not impair nor deny others retained by the people.

- Article I, Section 24, Maine Constitution

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Case text in italics indicates that we have inserted our language in place of the Court's language, for ease in reading.

*** Indicates that a significant portion of the Court's language has been omitted.

... Indicates that portions of a sentence or paragraph have been omitted.

INTRODUCTION

The Ninth Amendment and The Right to Privacy: If the word's not there, is the right?

The Ninth Amendment, a lesser known and seldom used amendment, has become embroiled in one of the most emotional and hotly debated constitutional issues of our times: whether a right of privacy is constitutionally guaranteed.

The Ninth Amendment does not create a right of privacy, nor any other right for that matter. It is, rather, a rule of interpretation. It was put into the Constitution because of the fear that specifically stating certain rights would lead to the conclusion that those few rights were the only ones protected by the Constitution. The Ninth Amendment says, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." But exactly what are these other "unenumerated" rights?

Most Americans would probably agree that privacy is an extremely important right. Many would assume that the Constitution protects their privacy from unwarranted government intrusion. Yet the word "privacy" does not appear anywhere in the Constitution or in the Bill of Rights. In 1965, in a case called Griswold v. Connecticut which concerned a statute banning the use of birth control by anyone, including married couples, the Supreme Court agreed that there was a constitutionally protected right of privacy and for the first time relied on the Ninth Amendment (in a concurring opinion) to find a fundamental right not stated specifically in the Constitution.

In Griswold, Justice Douglas proposed that the right of privacy is found in "penumbras" or shadows of the enumerated rights in the Bill of Rights. The right of privacy, he said, is implicit in the right of the people to be secure in their persons, houses, papers, and effects (Fourth), in the right against self-incrimination (Fifth), and in the right of association (First). Justice Goldberg, in a concurring opinion, relied on the Ninth Amendment as a rule of construction to find that privacy is a right "retained by the people". He said, "The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because the right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the ninth amendment and give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment..."

After its moment in the spotlight in Griswold, the Ninth Amendment all but disappeared from view in the ongoing dispute over privacy as an unenumerated right. (The only other Supreme Court opinion which explicitly relies on the Ninth Amendment is Richmond Newspapers v. Virginia, 448 U.S. 555 (1980), which concerned the right of the press and the public to attend criminal trials.) In Roe v. Wade (1970) a Texas federal district court relied on Griswold and the Ninth Amendment to strike down a state statute prohibiting abortion. The Supreme Court upheld this decision and found that the right of privacy encompasses a woman's decision to terminate her pregnancy, but relied on the due process clause of the Fourteenth Amendment and not the Ninth Amendment to do so.

Those on the other side of the debate, beginning with the dissenters in Griswold and perhaps the new majority on the current Supreme Court, say don't bother to look for a right of privacy in the Bill of Rights or the Fourteenth Amendment. If the word's not there the right's not there. Nothing in the Constitution or the Bill of Rights prevents the state or federal government from protecting society's interests by enacting legislation which regulates sexual conduct and reproductive choice. If the majority doesn't like the legislation, it will exert its political will to change the rules.

That's the nub of the legal debate that has been going on for 26 years. The subject of the debate—birth control, sexual relationships, abortion—touch deep feelings and beliefs about right and wrong for most of us. These feelings and beliefs don't have much to do with the legal questions with which the courts must deal, though sometimes it seems that's not clear even to the courts. The courts have struggled with a constitutional right of privacy and its implications and the justices are not immune from the emotionality of the debate.

The excerpts from the cases that follow explore the two lines of legal thinking: that a general right of privacy infuses our basic legal documents as a necessary fundamental, if unwritten, concept; and that a general right of privacy is not established by those documents, because the words aren't there.

Establishing the Right of Privacy: Reproductive Rights

In Griswold v. Connecticut the Director of Planned Parenthood challenged the Connecticut law banning the use of contraceptives by anyone, even married couples. The Supreme Court majority established a right of privacy in the marital relation, even though privacy is not specifically mentioned in the Bill of Rights. Justice Douglas, writing for the majority, suggested that various guarantees in the first ten amendments created "zones of privacy" which could be called upon to guarantee a right of privacy "older than the Bill of Rights."

Justice Goldberg, in his concurring opinion, specifically relied on the Ninth Amendment as a rule of interpretation which supported the right of privacy as a fundamental right, even though it is not explicitly listed among the rights guaranteed by the Constitution. He stated that the right of privacy is a "personal right retained by the people" within the meaning of the Ninth Amendment.

The dissenting justices disagreed, basically stating the opposing view that if the right of privacy is not explicit in the Constitution, it is not a protected right. The justices argued that the people can exercise their Ninth Amendment retained rights by simply pursuading their elected representatives to repeal the offending law.

Griswold, then, sets up the basic positions in the controversy over privacy and reproductive rights that has challenged the Court for almost 26 years. Excerpts from the opinions follow.

Griswold v. State of Connecticut
381 U.S. 479 (1965)

DOUGLAS, J. delivered the opinion of the Court, joined by Chief Justice Warren and Justices Goldberg, Brennan, and Clark. Justices Harlan and White concurred in the result. Justices Black and Stewart dissented.

***

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.... Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourth and Fifth Amendments were described in Boyd v. United States...as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred in Mapp v. Ohio...to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people."...

We have had many controversies over these penumbral rights of "privacy and repose."... These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

***

We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior discussions.

Reversed.

GOLDBERG, J., joined by Chief Justice Warren and Justice Brennan, concurring.

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. ... I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment... . I add these words to emphasize the relevance of that Amendment to the Court's holding.

The Court stated many years ago that the Due Process Clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."...

This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights. The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.

In presenting the proposed Amendment, Madison said:

"It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution [the Ninth Amendment]." ...

The opinion then quotes Justice Story on the meaning of the Ninth Amendment, from Commentaries on the Constitution of the United States 626-627 (5th Ed. 1891).

These statements of Madison and Story make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.

While this Court has had little occasion to interpret the Ninth Amendment, "*[i]t* cannot be presumed that any clause in the constitution is intended to be without effect."... In interpreting the Constitution, "real effect should be given to all the words it uses."... To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "[t]he enumeration in the Constitution, of certain rights, shall not be **construed** to deny or disparage others retained by the people." (Emphasis added.)

***

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family– a relation as old and as fundamental as our entire civilization— surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.

***

In sum, I believe that the right of privacy in the marital relation is fundamental and basic– a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States. I agree with the Court that petitioners' convictions must therefore be reversed.

STEWART, J., joined by Justice Black, dissenting.

Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. ... As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

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The Court also quotes the Ninth Amendment, and my Brother Goldberg's concurring opinion relies heavily upon it. But to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history. The Ninth Amendment, like its companion the

Tenth, which this Court held "states but a truism that all is retained which has not been surrendered,"...was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the Federal Government was to be a government of express and limited powers and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.

***

...If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.

Establishing the Right of Privacy: Reproductive Rights

Eisenstadt v. Baird extends the privacy debate to a law banning contraception for unmarried persons. The Court's majority said this is a distinction without meaning, because "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into . . . the decision whether to bear . . . a child."

An excerpt from the majority opinion follows.

Eisenstadt v. Baird
405 U.S. 438 (1972)

BRENNAN J., delivered the opinion of the Court, in which Justices Douglas, Stewart and Marshall joined. Justices White and Blackmun concurred in the result. Chief Justice Burger dissented. Justices Powell and Rehnquist did not participate in the decision.

Appellee William Baird was convicted at a bench trial in the Massachusetts Superior Court...for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and...for giving a young woman a package of [contraceptive] foam at the close of his address. The Massachusetts Supreme Judicial Court unanimously set aside the conviction for exhibiting contraceptives on the ground that it violated Baird's First Amendment rights, but by a four-to-three vote sustained the conviction for giving away the foam. ...

The Massachusetts law under which Baird was convicted makes it a felony for anyone to give away a contraceptive device or drug unless it is for a married person.

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...The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under *the Massachusetts law*. For the reasons that follow, we conclude that no such ground exists.

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If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. ...

On the other hand, if Griswold is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the underinclusion would be invidious. ...

...We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated, *the Massachusetts statute* violates the Equal Protection Clause. The judgment of the Court of Appeals is affirmed.

***

The Right of Privacy Encompasses a Woman's Right to Choose

Roe v. Wade, the Supreme Court decision legalizing abortion, is one of the most controversial decisions of the modern Court. The decision and its reasoning, which holds that the Consitutionally protected right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," is the subject of heated political and legal debate. A prospective federal judge's views on the abortion debate have been called by some the "litmus test" for whether that person will get a judicial nomination. The hearings for Supreme Court nominees Robert Bork, David Suter and Clarence Thomas highlighted the intense controversy about whether the Constitution guarantees privacy rights and specifically the right of a woman to have an abortion.

How did this controversy over abortion become a Constitutional debate? Before 1973, abortion was a crime in many states. In Texas it was a crime for a woman to have an abortion, and for a physician to perform one, unless the abortion was necessary to save the woman's life. A young, single woman who was pregnant disagreed with the Texas law. She had no home, no job, and no way to care for the child. She wanted an abortion, but she couldn't find a doctor willing to break the law and perform one. Desperate, she finally turned to two lawyers who agreed to help her. They wanted to test the Texas law in court, and agreed to take her on as their client. To protect her privacy, she used the name "Jane Roe" when she filed suit. "Roe" believed it would help all other women if she won the case.

Her lawyers argued that a woman has a Constitutional right to control her own body, citing Griswold and Eisenstadt and other cases finding a zone of privacy in the Constitution. The state of Texas said that its duty was to protect the lives of unborn children, a duty which outweighed any privacy right a woman might have.

The U.S. Supreme Court decided, in a 7-2 decision, that married and single women have a legal right to an abortion, and that the Texas law and others like it was unconstitutional. The Court based its decision on the Fourteenth Amendment which guarantees that no person shall be deprived of "liberty . . . without due process of law."

The Court said that the term "liberty" includes the right to personal privacy. The Texas law deprived women of their liberty. The state's interest in protecting the mother's health and possible human life becomes significant depending on when the abortion is performed. Thus the Court established its 3-part scheme:

1. In the first 3 months of preganancy, the abortion decision is up to the woman.
2. In the second 3 months, the state may regulate abortions to protect the mother's health, but not stop them.
3. In the last 3 months, the state can prohibit abortions, unless needed to save the mother's life.

Excerpts from the majority and dissenting opinions follow.

Roe v. Wade
410 U.S. 113 (1973)

BLACKMUN, J. delivered the opinion of the Court, in which Chief Justice Burger and Justices Douglas, Brennan, Stewart, Powell and Marshall joined. Justices White and Rehnquist dissented.

> This Texas federal appeal and its Georgia companion, Doe v. Bolton, present constitutional challenges to state criminal abortion legislation. ...
>
> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experi-

ences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortive procedure over the centuries. ...

The Texas statutes that concern us here...make it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States.

***

Jane Roe, a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

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Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously. ...

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. ... Thus is has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various **amici** refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the area of health and medical standards do remain. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient.... Moreover, the risk to the woman increases as her pregnancy continues. Thus the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

The third reason is the State's interest - some phrase it in terms of duty - in protecting prenatal life. ... Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least **potential** life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

***

It is with these interests and the weight to be attached to them, that this case is concerned.

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however...the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. ...

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellants and some **amici** argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellants' arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, is unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a state may properly assert important interests in safe-guarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some **amici** that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. ...

We therefore conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.

***

Texas urges that...life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

***

...We do not agree that, by adopting one theory of life, Texas may override the rights of pregnant women that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the state or a nonresident who seeks medical consultation and treatment there, and that it has still **another** important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now established medical fact that until the end of the first trimester mortality in abortion is less than mortality in normal childbirth. If follows that, from and after this point, a state may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother.

Measured against these odds, *the Texas statute*, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

To summarize and to repeat:

1. A state criminal abortion statute...that excepts from criminality only a life saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.
    (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

***

REHNQUIST, J. dissenting.

...I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy.

If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of Justice Stewart in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated... . But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

Minors' Rights to Privacy: Parental Consent Laws

In Roe v. Wade the Supreme Court balanced the privacy concerns of a pregnant woman against the interests of the state. The right to abortion, the Court said, is not absolute. Maine is one of the states which have passed laws attempting to regulate abortions during the first two-thirds of pregnancy, when the Court said the state's interests were weakest. Many of these efforts were directed at minors.

In 1979, Maine passed a statute on abortions. The law had several parts:

1. It required parents to be notified in advance of a minor's decision to have an abortion.
2. It required the attending physician to counsel a pregnant woman about alternatives to abortion; and
3. It required a 48-hour waiting period between the time of counseling and performance of the abortion.

People opposed to the law, including some doctors and a woman's health clinic, sued in the United States District Court of Maine to prevent the law's enforcement. Excerpts from the opinion are included here.

Two years later, the U.S. Supreme Court heard another case involving parental notification, H.L. v. Matheson. That case arose under a Utah law which required a doctor to give notice to parents before performing an abortion on a minor, when the girl was living with and dependent on her parents, when she was not emancipated by marriage or otherwise, and when she made no claim of her maturity or independence. The Court characterized the situation as a "mere requirement of parental notice" which does not violate the Constitutional rights of an "immature, dependent minor." The dissenting justices disagreed and argued the law "unquestionably burdens the minor's privacy right," and the state's asserted interests did not warrant its intrusion into her privacy.

Excerpts from the majority and dissenting opionions in Matheson follow the Cohen case.

Women's Community Health Center, Inc. v. Cohen

477 F. Supp. 542 (D. Me. 1979)

GIGNOUX, Chief Judge.

Plaintiffs in these consolidated actions ... seek ... relief against the enforcement of two Maine statutes regulating the performance of abortions.... The first of these statutes ... requires parental notification of an unemancipated minor's decision to undergo an abortion. The second statute ... requires the attending physician to counsel a woman in order to ensure that her consent to an abortion is truly informed, and further requires a 48-hour waiting period between the informed consent counseling and the performance of the abortion. Both statutes are challenged as impermissibly interfering with the constitutional right of a woman, in consultation with her physician, to terminate her pregnancy, as that right was established by Roe v. Wade.

****

Decisions subsequent to Roe make clear that not all regulation of first trimester abortions is impermissible. *The court reviews the constitutional standards for state regulation of abortions, and concludes that regulation is permitted as long as it does not "unduly burden" the abortion decision.*

...Accordingly, the Court must determine with respect to each statutory provision whether it imposes an undue burden on a woman's consitutional right, in consultation with ther physician, to choose to terminate her pregnancy.

Section 1597 *of the Maine statutes* ... requires a physician, prior to performing an abortion on an unemancipated minor who is less than 17 years of age, to give actual notice to one of her parents or guardians at least 24 hours before performing the abortion. ... The statute specifically provides that nothing therein shall require the consent of the minor's parents or guardian to her abortion. Violation of the statute subjects a physician to criminal liability....

...*M*andatory parental notification will prove to be unduly burdensome on the abortion decision of some minors. ...*I*n some cases parents will pressure the minor, causing great emotional distress and otherwise disrupting the family relationship. ... Notifying some parents of a child's pregnancy can create physical and psychological risks to the child. ... In particular, it may cause an adolescent to delay seeking assistance with her pregnancy, increasing the hazardousness of an abortion should she choose one. *Therefore, the Court finds the notification provision unconstitutional.*

Section 1598 ... requires ... that the physician inform the woman that she is pregnant; of the number of weeks elapsed from the probable time of conception; of the particular risks associated with her pregnancy and the abortion technique to be used; of alternatives to abortion such as childbirth and adoption; and information concerning public and private agencies that will assist her to carry the fetus to term.... . *Section 1598 also requires* the physician to wait at least 48 hours after *providing that information to the woman* before performing the abortion... . A physician breaching... these duties is subject to criminal penalties....

...The statutory requirement *of informed consent counseling* rationally serves the state's legitimate interest in assuring that the woman makes a fully informed decision. ...The courts have consistently sustained similar informed consent provisions. ... Requiring the physician to advise the woman as to the alternatives to abortion additionally serves the state's legitimate interest in encouraging childbirth and protecting a potential life. ... In sum, plaintiffs have not *shown* that this requirement unduly burdens a woman's constitutional right. ...

The Court next discusses the requirement of the 48-hour waiting period. It is clear from the record that the burden imposed on the woman's abortion decision is "legally significant." ... Not only does the evidence disclose that a 48-hour waiting period may increase the medical risk, emotional stress and financial cost of an abortion to the woman, but, perhaps most significantly, a woman who has chosen to have an abortion would be *prevented*, at least temporarily, from effectuating that decision. The Supreme Court has recently reaffirmed that "direct state interference" ... may not be used to further otherwise valid state interests in regulating abortions. *Therefore, the 48-hour waiting period is unconstitutional.*

H.L. v. Matheson, Governor of Utah

450 U.S. 398 (1981)

BURGER, C.J., delivered the opinion of the Court, in which Justices Stewart, White, Powell and Rehnquist joined. Justice Stevens concurred in the judgment. Justices Marshall, Brennan and Blackmun dissented.

***

The only issue before us...is the facial constitutionality of a statute requiring a physician to give notice to parents, "if possible," prior to performing an abortion on their minor daughter, (a) when the girl is living with and dependent upon her parents, (b) when she is not emancipated by marriage or otherwise, and (c) when she has made no claim or showing as to her maturity or as to her relations with her parents.

Appellant contends the statute violates the right to privacy recognized in our prior cases with respect to abortions. ...

***

Although we have held that a state may not constitutionally legislate a blanket, unreviewable power of parents to veto their daughter's abortion, a statute setting out a "mere requirement of parental notice" does not violate the constitutional rights of an immature, dependent minor.

***

The Utah statute gives neither parents nor judges a veto power over the minor's abortion decision. As in Bellotti I, "we are concerned with a statute directed toward minors, as to whom there are unquestionably greater risks of inability to give an informed consent." As applied to immature and dependent minors, the statute plainly serves the important considerations of family integrity and protecting adolescents which we identified in Bellotti II. In addition, as applied to that class [of minors], the statute serves a significant state interest by providing an opportunity for parents to supply essential medical and other information to a physician. The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data.

***

That the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute as applied to appellant and the class properly before us. The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action "encouraging childbirth except in the most urgent circumstances" is "rationally related to the legitimate governmental objective of protecting potential life."...

...The statute plainly serves important state interests, is narrowly drawn to protect only those interests, and does not violate any guarantees of the Constitution.

MARSHALL, J., with whom Justice Brennan and Justice Blackmun join, dissenting.

***

The ideal of a supportive family so pervades our culture that it may seem incongruous to examine "burdens" imposed by a statute requiring parental notice of a minor daughter's decision to terminate her pregnancy.

***

Realistically, however, many families do not conform to this ideal. Many minors, like appellant, oppose parental notice and seek instead to preserve the fundamental, personal right to privacy. It is for these minors that the parental notification requirement creates a problem. In this context, involving the minor's parents against her wishes effectively cancels her right to avoid disclosure of her personal choice. ...Moreover, the absolute notice requirement publicizes her private consultation with her doctor and interjects additional parties in the very conference held confidential in Roe v. Wade. Besides revealing a confidential decision, the parental notice requirement may limit "access to the means of effectuating that decision."...

***

...Because the Utah requirement of mandatory parental notice unquestionably burdens the minor's privacy right, the proper analysis turns next to the State's proffered justifications for the infringements posed by the statute.

***

...Specifically, appellees contend that the notice requirement improves the physician's medical judgment about a pregnant minor in two ways: it permits the parents to provide additional information to the physician, and it encourages consultation between the parents and the minor woman. Appellees also advance an independent state interest in preserving parental rights and family autonomy. *The opinion then discusses the first two interests, concluding that the statute on its face does not serve those interests.*

***

Finally, appellees assert a state interest in protecting parental authority and family integrity. This Court, of course, has recognized that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."... Indeed, "those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." ... Similarly, our decisions "have respected the private realm of family life which the state cannot enter."...

The critical thrust of these decisions has been to protect the privacy of individual families from unwarranted state intrusion. Ironically, appellees invoke these decisions in seeking to justify state interference in the normal functioning of the family. Through its notice requirement, the State in fact enters the private realm of the family rather than leaving unaltered the pattern of interactions chosen by the family. Whatever its motive, state intervention is hardly likely to resurrect parental authority that the parents themselves are unable to preserve. ...

***

None of the reasons offered by the State justifies this intrusion, for the statute is not tailored to serve them. Rather than serving to enhance the physician's judgment , in cases such as appellant's the statute prevents implementation of the physician's medical recommendation. Rather than promoting the transfer of information held by parents to the minor's physician, the statute neglects to require anything more than a communication from the physician moments before the abortion. Rather than respecting the private realm of family life, the statute invokes the criminal justice machinery of the State in an attempt to influence the interactions within the family. Accordingly, I would reverse the judgment of the Supreme Court of Utah insofar as it upheld the statute against constitutional attack.

The Right of Privacy Curtailed: Does Roe v. Wade Still Stand?

Many abortion cases have come before the Supreme Court since Roe v. Wade, and each time the Court has reaffirmed a qualified Constitutional right to privacy which encompasses the abortion decision. However, the Court's new majority has begun challenging the reasoning which underlies the Roe decision. In Webster v. Reproductive Health Services, the majority upheld Roe but questioned the continuing vitality of the trimester framework which balances the woman's right to choose with the state's interests in maternal health and potential life. Justice Blackmun, who wrote the Roe decision, says in his dissent: "For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."

The Webster case involved five health care professionals employed by the State of Missouri who offered abortion counseling or services and two nonprofit organizations which offered abortion services. They challenged provisions of a Missouri statute regulating abortion which they said made it impossible to provide their services.

The provisions before the Court were:

1. The preamble to the statute, defining conception as the beginning of human life and declaring unborn children to have protectable interests in life, health, and well-being;
2. the prohibition against using public facilities or employees to perform or assist in abortions;
3. the prohibition against using public funds for abortion counseling; and
4. the requirement that physicians perform tests to determine fetal viability before performing an abortion.

The Court said the preamble was a "sort of" value judgment in favor of childbirth, but was not unconstitutional until and unless it was used to prohibit abortion. So the Court deferred judgment on the preamble.

The provisions prohibiting the use of public employees and public facilities to perform abortions were upheld based on the Court's previous decisions. The State can withhold public funds from being used to pay for abortions, a policy decision encouraging childbirth rather than abortion. This was no different.

The ban on using public funds to encourage or counsel a woman to have an abortion was interpreted as not gagging public health care providers, but merely withholding money generally for abortion counseling. (The gag order would be upheld later in Rust v. Sullivan (1991).) Thus, this provision was upheld.

The Court split on the provisions requiring physicians to test for fetal viability before performing an abortion. Here the difference between the new majority and the dissenters became more evident. A plurality decided the testing requirement was constitutional, while questioning the continuing validity of Roe's trimester framework. Justice O'Connor concurred, but said Roe should be re-examined in due course. Justice Scalia also concurred, but went further and said Roe should be reconsidered now. Thus, it was these clear indications of dissatisfaction which led Justice Blackman to warn of the "chill winds" blowing around Roe v. Wade.

Excerpts from Justice Rehnquist's plurality opinion and Justice Blackmun's dissent follow.

Webster v. Reproductive Health Services

492 U.S. 490 (1989)

Rehnquist, C.J., announced the judgment of the Court and delivered a plurality opinion which Justices White and Kennedy joined. Justices O'Connor and Scalia concurred in part and concurred in the judgment. Justices Blackmun, Brennan and Marshall concurred in part and dissented in part, as did Justice Stevens.

This appeal concerns the constitutionality of a Missouri statute regulating the performance of abortions. The United States Court of Appeals for the Eighth Circuit struck down several provisions of the statute on the ground that they violated this Court's decision in Roe v. Wade, 410 U.S. 113 (1973), and cases following it. We...now reverse.

***

The viability-testing provision of the Missouri Act is concerned with promoting the State's interest in potential human life rather than in maternal health. Section 188.029 [*of the statute*] creates what is essentially a presumption of viability at 20 weeks, which the physician must rebut with tests indicating that the fetus is not viable prior to performing an abortion.

***

We think that the doubt cast upon the Missouri statute...is not so much a flaw in the statute as it is a reflection of the fact that the rigid trimester analysis of the course of a pregnancy enunciated in Roe has resulted in subsequent cases...making constitutional law in this area a virtual Procrustean bed. ...

In the first place, the rigid Roe framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does. The key elements of the Roe framework - trimesters and viability - are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. ...

In the second place, we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability. The dissenters in Thornburgh v. American College of Obstetricians and Gynecologists writing in the context of the Roe trimester analysis, would have recognized this fact by positing against the "fundamental right" recognized in Roe, the State's "compelling interest" in protecting potential human life throughout pregnancy. "The State's interest, if compelling after viability, is equally compelling before viability."...

The tests that *the Missouri law* requires the physician to perform are designed to determine viability. The State has chosen viability as the point at which its interest in potential human life must be safeguarded. It is true that the tests in question increase the expense of abortion, and regulate the discretion of the physician in determining the viability of the fetus. Since the tests will undoubtedly show in many cases that the fetus is not viable, the tests will have been performed for what were in fact second-trimester abortions. But we are satisfied that the requirement of these tests permissibly furthers the State's interest in protecting potential human life, and we therefore believe Section 188.029 *of the law* to be constitutional.

***

Both appellants and the United States as **Amicus Curiae** have urged that we overrule our decision in Roe v. Wade. The facts of the present case, however, differ from those at issue in Roe. Here, Missouri has determined that viability is the point at which its interest in potential human life must be safeguarded. In Roe, on the other hand, the Texas statute criminalized the performance of **all** abortions, except when the mother's life was at stake. This case therefore affords us no occasion to revisit the holding of Roe, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause, and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow Roe and succeeding cases.

Because none of the challenged provisions of the Missouri Act properly before us conflict with the Constitution, the judgment of the Court of Appeals is

Reversed.

BLACKMUN, C.J., with whom Justice Brennan and Justice Marshall join, concurring in part and dissenting in part.

Today, Roe v. Wade, 410 U.S. 113 (1973), and the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive but are not secure. Although the Court extricates itself from this case without making a single, even incremental, change in the law of abortion, the plurality and Justice Scalia would overrule Roe (the first silently, the other explicitly) and would return to the States virtually unfettered authority to control the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term.

***

The plurality opinion is far more remarkable for the arguments that it does not advance than for those that it does. The plurality does not even mention, much less join, the true jurisprudential debate underlying this case: whether the Constitution includes an "unenumerated" general right to privacy as recognized in many of our decisions, most notably Griswold v. Connecticut, and Roe, and, more specifically, whether and to what extent such a right to privacy extends to matters of childbearing and family life, including abortion. These are questions of unsurpassed significance in this Court's interpretation of the Constitution, and mark the battleground upon which this case was fought, by the parties, by the Solicitor General as **amicus** on behalf of petitioners, and by an unprecedented number of **amici**. On these grounds, abandoned by the plurality, the Court should decide this case.

But rather than arguing that the text of the Constitution makes no mention of the right to privacy, the plurality complains that the critical elements of the Roe framework - trimesters and viability - do not appear in the Constitution and are, therefore, somehow inconsistent with a Constitution cast in general terms. Were this a true concern, we would have to abandon most of our constitutional jurisprudence. As the plurality well knows, or should know, the "critical elements" of countless constitutional doctrines nowhere appear in the Constitution's text. ...

With respect to the Roe framework, the general constitutional principle, indeed the fundamental constitutional right, for which it was developed is the right to privacy, see, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965), a species of "liberty" protected by the Due Process Clause, which under our past decisions safeguards the right of women to exercise some control over their own role in procreation. As we recently reaffirmed in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), few decisions are "more basic to individual dignity and autonomy" or more appropriate to that "certain private sphere of individual liberty" that the Constitution reserves from the intrusive reach of government than the right to make the uniquely personal, intimate and self-determining decision whether to end a pregnancy. It is this general principle, the " 'moral fact that a person belongs to himself and not others nor to society as a whole,' "...that is found in the Constitution. The trimester framework simply defines and limits that right to privacy in the abortion context to accommodate, not destroy, a State's legitimate interest in protecting the health of pregnant women and in preserving potential human life. Fashioning such accommodations between individual rights and the legitimate interests of government, establishing benchmarks and standards with which to evaluate the competing claims of individuals and government, lies at the very heart of constitutional adjudication. To the extent that the trimester framework is useful in this enterprise, it is not only consistent with constitutional interpretation, but necessary to the wise and just exercise of this Court's paramount authority to define the scope of constitutional rights. ...

***

Finally, the plurality asserts that the trimester framework cannot stand because the State's interest in potential life is compelling throughout pregnancy, not merely after viability. The opinion contains not one word of rationale for its view of the State's interest. This "it-is-so-because-we-say-so" jurisprudence constitutes nothing other than an attempted exercise of brute force; reason, much less persuasion, has no place.

In answering the plurality's claim that the State's interest in the fetus is uniform and compelling throughout pregnancy, I cannot improve upon what Justice Stevens has written:

> "I should think it obvious that the State's interest in the protection of an embryo - even if that interest is defined as 'protecting those who will be citizens'... - increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day. The development of a fetus - and pregnancy itself - are not static conditions, and the assertion that the government's interest is static simply ignores this reality... . *U*nless the religious view that a fetus is a 'person' is adopted...there is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures. And if distinctions may be drawn between a fetus and a human being in terms of the state interest in their protection - even though the fetus represents one of 'those who will be citizens' - it seems to me quite odd to argue that distinctions may not also be drawn between the state interest in protecting the freshly fertilized egg and the state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth. Recognition of this distinction is supported not only by logic, but also by history and by our shared experiences." Thornburgh, 476 U.S., at 778-779 (footnotes omitted).

For my own part, I remain convinced, as six other Members of this Court 16 years ago were convinced, that the Roe framework, and the viability standard in particular, fairly, sensibly, and effectively functions to safeguard the constitutional liberties of pregnant women while recognizing and accommodating the State's interest in potential human life.

***

For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.

I dissent.

THE TENTH AMENDMENT

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

- *Amendment X, United States Constitution*

The enumeration of certain rights shall not impair nor deny others retained by the people.

- *Article I, Section 24, Maine Constitution*

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Case text in italics indicates that we have inserted our language in place of the Court's language, for ease in reading.

*** Indicates that a significant portion of the Court's language has been omitted.

... Indicates that portions of a sentence or paragraph have been omitted.

Introduction

The Tenth Amendment has had little impact in Constitutional law since McCulloch v. Maryland, 17 U.S. 316 (1819). Chief Justice Marshall's opinion in McCulloch was essentially a justification for Congressional power at the expense of the states. The Court relied on the "necessary and proper" clause of the Constitution (Article I, Section 8) to expand the scope of Congressional lawmaking. The Court also eliminated the state power to tax as a means of undermining Congressional acts. Marshall's opinion concluded:

> "The states have no power, by taxation or otherwise, to retard, burden or in any manner control the operations of the Constitutional laws enacted by Congress."

Combined with the wide scope of Congressional regulation of interstate commerce under the Commerce Clause of the Constitution (Article I, Section 8, Cl. 3), the operation of the Necessary and Proper Clause as interpreted in McCulloch has given Congress broad power to legislate and regulate state activities. National power has overshadowed the power of the states which was reserved in the Tenth Amendment. Contrast the Tenth Amendment's language with its counterpart in the earlier Articles of Confederation, Article IX, in which the states retained "every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States."

Two cases involving the minimum wage reflect the tension between State and federal authority that the Tenth sets up. In 1974 Congress amended the Fair Labor Standards Act (FLSA) so that its minimum wage and overtime provisions would apply to employees of state and local governments. Before those amendments, state and local governments had been exempt from federal regulation of work hours and wages. The National League of Cities, representing the interests of state and local governments nationwide, challenged the constitutionality of the FLSA amendments under the Tenth Amendment. The issue was state sovereignty, and what limits the Constitution placed on Congress to prevent federal interference with the essential functions of state government. State authority prevailed, but the court changed its mind nine years later.

State Powers And Federal Powers: The States Prevail

Justice Rehnquist (now Chief Justice), writing for the U.S. Supreme Court majority in its 5-4 decision in National League of Cities, attempted to revive state sovereignty in relation to federal power by breathing new life into the Tenth Amendment. The Court invalidated the FLSA amendments because of the limits set by the Tenth Amendment on Congressional authority.

The National League of Cities v. Secretary of Labor

426 U.S. 833 (1976)

REHNQUIST, J., joined by Burger, Stewart, Blackmun and Powell. Blackmun filed a separate concurring opinion. Brennan, White, Marshall and Stevens dissented.

> This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Article I of the Constitution. ...*The Court has* recognized that an express declaration of this limitation is found in the Tenth Amendment:
>
> > "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,'... it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."...
>
> One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are "functions essential to separate and independent existence,"...so that Congress may not abrogate the States' otherwise plenary authority to make them. ...
>
> Our examination...satisfies us that both the minimum wage and the maximum hour provisions will impermissibly interfere with the integral governmental functions of these bodies. ...
>
> This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Article I, Section 8, clause 3. ...

State Powers And Federal Powers: The States Lose

Nine years later, the Court again considered a challenge to the application of federal labor standards to a local metropolitan transit authority. The lower court had ruled these were traditional governmental functions and so exempt from the FLSA; but three federal appellate courts and one state appellate court had reached the opposite conclusion on the identical question. Rather than splitting hairs over what were the states' "traditional governmental functions," the Court overruled National League of Cities in another 5-4 decision. Justice Blackmun, in the majority in National League of Cities, was persuaded the rule of the case was unworkable and inconsistent with principles of federalism. He wrote the opinion for the new majority, re-establishing federal power over wages and working conditions of state and local authorities.

Garcia v. San Antonio Metropolitan Transit Authority

469 U.S. 528 (1985)

BLACKMUN, J., joined by Brennan, White, Marshall and Stevens. Powell, Rehnquist, Burger and O'Connor dissented.

We revisit in these cases an issue raised in National League of Cities v. Usery. In that litigation, this Court, by a sharply divided vote, ruled that the Commerce Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA) against the States "in areas of traditional governmental functions."...

Our examination of this "function" standard applied...over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which National League of Cities purported to rest. That case, accordingly, is overruled. ...

The central theme of National League of Cities was that the States occupy a special position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. ...

What has proved problematic is not the perception that the Constitution's federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations. ...

...*The* sovereignty of the States is limited by the Constitution itself.

The States unquestionably do "retai*n* a significant measure of sovereign authority."...They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government. ...

Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended. ...

The Powers Of States And Cities

The Tenth Amendment has no exact counterpart in the Maine Constitution. An analogous provision, dealing with the power of local municipalities in relation to the state, is found in Article VIII, part 2, section 1, which grants municipalities "the power to alter and amend their charters on all matters, not prohibited by the Constitution or general law, which are local and municipal in character."

In Schwanda v. Bonney, the Maine Supreme Judicial Court considered the application of this provision to a local gun control ordinance. The Town of Freeport had passed an ordinance more restrictive than state law on issuing permits to carry a concealed weapon. Schwanda, who was denied a gun permit, challenged the validity of the ordinance. The Court found this was not a matter which was "local and municipal in character," but of statewide application. Because the constitutional provision did not protect Freeport's ordinance, its more restrictive provisions were invalid.

Schwanda v. Bonney

418 A.2d 163 (Me. 1980)

DUFRESNE, Active Retired Justice, joined by McKusick, Wernick, Glassman and Roberts.

In this appeal we are called upon to address the validity of a local ordinance of the Town of Freeport which imposes requirements beyond the statutory criteria for the issuance of licenses to carry concealed weapons. ...

Municipal corporations, as public bodies, may exercise only such powers as the Legislature has conferred upon them by law or which may have been granted to them directly by the Constitution. ...

Legislative history supports our conclusion that municipalities have not been delegated the power to impose restrictions beyond the statutory standard of "good moral character" in the licensing of persons to carry concealed weapons. ...

Neither the Constitution, nor the home rule statute, so-called, gives the Town of Freeport the power to regulate, in the manner the defendants claim, respecting the issuance of licenses to carry concealed weapons. The Constitution of the State of Maine, in Article VIII, Part Second, Section 1, provides:

> The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character... .(Effective November 17, 1969).

The licensing act has statewide application; it does not involve "matters...which are local and municipal in character."

The Freeport ordinance imposes licensing criteria beyond the statutory requirements and to that extent is invalid; the denial of the license to Schwanda based solely on his failure to meet such non-statutory prerequisites was error of law and must be reversed.

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deny to any person within its jurisdiction the equal protection of the law.

– Amendment XIV, Section I, United States Constitution

No person shall be . . . denied the equal protection of the laws, . . .

- Article I, Section 6-A, Maine Constitution

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Case text in italics indicates that we have inserted our language in place of the Court's language, for ease in reading.

*** Indicates that a significant portion of the Court's language has been omitted.

... Indicates that portions of a sentence or paragraph have been omitted.

Introduction

The Fourteenth Amendment was one of three added to the Constitution after the Civil War. (The Thirteenth abolished slavery; the Fifteenth guaranteed to the new citizens the right to vote.) The Fourteenth confers state and federal citizenship on all persons born or naturalized in the United States irrespective of race. Additionally, the Fourteenth contains two clauses considered by many to be the most important in the Constitution. The Due Process Clause provides that "No State shall deprive any person of life, liberty or property without due process of law." The Equal Protection Clause states that "No state shall...deny any person within its jurisdiction the equal protection of the laws." Issues arising under these clauses generate more than half of all cases heard in the Supreme Court.

The equal protection clause mandates the equal treatment by the states of one citizen in relation to another citizen. The clause applies only to States, as governmental entities, not to private parties or actions having no connection to the state. Consequently, a case involving equal protection requires some form of "state action" before a court may act. State action is involved in a case arising from a state statute, a local ordinance, or actions of government officials or agencies. State action is also found in three other situations: cases involving private performance of public function; cases where there is significant state involvement in private activities; and cases involving state enforcement or encouragement of private discrimination.

If state action exists, the next question for a court is the standard or test to be applied in deciding whether the requirement of equal protection has been violated. There are two standards: the rational basis standard, and the strict scrutiny standard. A question of equal protection arises when some state action treats one person or type of persons differently from others. Not all "different treatment" is a violation of equal protection. Some kinds of different treatment are legal if they pass the rational basis test. Others are legal if they pass the strict scrutiny test.

The Rational Basis Standard

The rational basis test is applied when state action regulates economic affairs and social matters which have an economic basis. Courts have decided that states are entitled to more deference in managing these activities. The rational basis standard says that different treatment among persons in these matters has to be rational and must further a proper governmental purpose.

An example of the rational basis test is United States Department of Agriculture v. Moreno. This case challenged the constitutionality of a section of the Food Stamp Act which excluded from participation any household containing an individual who is unrelated to any other member of the household. Those excluded argued that this section created unreasonable difference, or "classification" between households of related persons and households containing unrelated persons. The government argued that the section was intended to make "hippy" communes ineligible for assistance and to prevent fraud in the program. The Court first found that there was no legitimate governmental purpose in singling out a socially unorthodox group for unequal treatment under the Act. The Court then said that the denial of assistance to otherwise eligible households containing unrelated members was not "a rational effort" to prevent fraud in the program because in practical operation the exclusion would affect only those persons "who are so desperately in need of aid that they cannot even afford to alter living arrangements so as to retain their eligibility."

The Strict Scrutiny Standard

As the equal protection analysis developed, certain classifications made by the states were subjected to a higher form of examination by the courts. The strict scrutiny standard was applied to these classifications because they inherently undermined equal protection. The courts employ the strict scrutiny standard where the state action involves a "suspect classification" or a classification affecting a "fundamental right." State action having either of these effects is valid if it is necessary to promote a "compelling" state interest and is the least burdensome alternative available to advance that interest.

Classifications involving race, alien status, national origin, and religion have generally been treated as "suspect," and subject to the strict scrutiny standard. The application of the strict scrutiny standard to these classifications is not always uniform, particularly in Supreme Court decisions regarding race and alien status.

Some classifications, such as sex, legitimacy of birth and wealth, are treated as partially suspect classifications, sometimes subject to high-level scrutiny or sometimes subject to a lower level scrutiny. For example, in Craig v. Boren, Justice Brennan urged the Supreme Court to adopt an intermediate standard applicable to classifications based on sex. Craig involved a state statute which prohibited the sale of 3.2% beer to males under age 21 and to females under 18. A male challenged the constitutionality of the law, claiming it was a denial of the equal protection to males 18-21 years of age. Justice Brennan argued that classifications based on sex were "subject to scrutiny [but not strict scrutiny] under the Equal Protection Clause." However, he argued that such classifications should only be upheld if they served "important governmental objectives" and were "substantially related to achievement of those objectives." In other words, sex-based classifications would have to meet an intermediate standard: something less than strict scrutiny but something more than rationality. Justice Brennan found that the classification established by the statute in the case was not substantially related to the achievement of important governmental objectives, because there was no proof that the law actually enhanced traffic safety, as was argued by the state.

The strict scrutiny standard is also applied to classifications that have deleterious effects on "fundamental" rights. In this area, the courts have primarily been concerned with a determination of what are the "fundamental" rights that are protected by the Equal Protection Clause. The Court has used the strict scrutiny standard in cases involving free expression, the right to travel and the right to vote.

For example, in Shapiro v. Thompson, the Supreme Court invalidated a state statute requiring residency in the state for at least one year in order to become eligible for public welfare. The Court reasoned that the statute created two classes of residents—needy residents residing in the state for a year or more and needy residents residing in the state less than a year. Applying the strict scrutiny standard, the Court found that such a classification penalized the exercise of the right to travel between states. According to the Court this right, though not explicit, was fundamental. Classifications impinging upon the right could only be justified if necessary to promote a compelling governmental interest. The Court found that the state had no compelling interest in deterring the migration of indigents into the state.

Racial Discrimination

Because of the continuing problem of racial discrimination in American society after the end of slavery, many equal protection cases since the adoption of the Fourtheenth Amendment have dealt with state actions that discriminate against black people. Strauder v. West Virginia, 100 U.S. 303 (1879), was the first Supreme Court case to hold that the Equal Protection Clause was violated by a state law that discriminated on the basis of race. The state law provided that only "white male persons" would be assigned jury service; the Supreme Court said that the law amounted to a denial of equal protection to black people. The case of Yick Wo v. Hopkins, 118 U.S. 356 (1886), involving the discriminatory administration of state laws against Chinese people, made it clear that the Equal Protection Clause protected people of all races.

In spite of these initial decisions, the Supreme Court in 1896 created the "separate but equal" doctrine authorizing racial segregation. In Plessy v. Ferguson, 163 U.S. 537 (1896), the Court upheld a Louisiana statute which required all railroads to provide "separate but equal" accommodations for white and black passengers and imposed a criminal penalty on any passenger insisting on accommodations in the area of the other race. The Court stated that the Equal Protection Clause was not intended to abolish all racial "distinctions" nor enforce "social" as opposed to political equality. Thus racial segregation had the force of law for almost sixty years until the Supreme Court decision in Brown v. Board of Education, 347 U.S. 483 (1954), struck down the "separate but equal" doctrine.

In Loving v. Virginia, 388 U.S. 1 (1967), a case which challenged a state law prohibiting interracial marriages, the Court discussed the modern adaptation of the strict scrutiny standard to classifications based on race. The Court found racial classifications to be inherently suspect and subject to the "most rigid scrutiny." The Court said that if a racial classification was not necessary to the accomplishment of some permissible state interest independent of a racially discriminatory purpose, then it was invalid.

School Desegregation

The first area of attack against racial discrimination was education. In Brown, the Supreme Court invalidated state-imposed racial discrimination in public schools. Noting the importance of education and the detrimental effects racial segregation had on black children, the Court said, "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." In Brown II, the Court left to the lower federal courts the task of working out how desegregation of public schools was to be accomplished. Because of the resistance to desegregation, the process was slow and to this day remains a source of controversy.

In Swann v. Charlotte-Mecklenburg Board of Education, the Supreme Court pressed for speedier desegregation of "dual" school systems. These school systems were primarily located in the South where state-imposed desegregation had created many one-race schools. The Court ruled that bus transportation and the assignment of students to schools on the basis of their race could be utilized to desegregate these school systems.

In the North and the West, most states had not mandated segregated "dual" school systems. Nevertheless, as a result of "unofficial" local policies and residential patterns, segregated schools existed in many areas. Most current school desegregation cases involve school systems of this type. In Keyes v. School District No. 1, the Supreme Court required proof that segregation in these systems was the result of the intentional acts of the school authorities. However, proof of intentional segregation in a substantial portion of the schools in a system would be strong evidence that the school district was operating a "dual" system.

Another problem in desegregating these schools was segregation caused by "white flight"—residential movement of white people to suburban school systems, creating more and more predominantly black urban schools. A federal district judge found that school authorities in Detroit, Michigan, maintained a policy of segregation in the schools. Because the Detroit school system was overwhelmingly black, the judge ordered a desegregation plan involving several suburban school districts. The Supreme Court held that the federal district court could not order such a plan unless it was shown that the racially discriminatory acts of the state or suburban school districts had been a substantial cause of the district-based segregation.

Other recent Supreme Court cases have discussed remedies to desegregate the schools. In Pasadena City Board of Education v. Spangler, the Court said that lower court desegregation orders cannot require the annual adjustments of the racial mixture of public school student populations. Two recent cases, Dayton Board of Education v. Brinkman, and Columbus Board of Education v. Penick, held that systemwide desegregation was appropriate if the district's school board deliberately segregated a substantial portion of the school district in the past because the current segregation of the schools would be assumed to have resulted from past school board policies.

Affirmative Action

It is a fundamental principle of the law that "where there has been a wrong, there must be a remedy," that is, a way to right the wrong. What remedies are to be designed for societal wrongs — like past discrimination, segregation, unequal opportunity — committed against groups of people? What if a remedy infringes on the rights of other groups of people? The controversies surrounding affirmative action and other antidiscrimination programs has involved such issues.

The Supreme Court was confronted with these issues in Regents of University of California v. Bakke. Bakke challenged the constitutionality of a special admission program at the University of California at Davis Medical School in which candidates who were "economically and/or educationally disadvantaged" or members of a "minority group" were considered separately from general admission candidates. Sixteen places out of a total of 100 were set aside for the special admission program. Bakke, a white male applicant, applied twice for general admission and was rejected although applicants admitted under the special admission program had lower grade point averages and admission test scores. Bakke argued that the special admission program excluded him on the basis of race in violation of the Equal Protection Clause. With an unusual alignment of many opinions, the Court held that the special admissions program was illegal, but that race could be considered in a special admissions process so long as it is not the exclusive and determinative factor.

The equal protection clause of the Fourteenth Amendment confronts the Court with some of the most socially sensitive issues of the day. The constitutional guarantee of equality is a process that began with the passage of the Fourteenth Amendment and is ongoing. The cases which follow deal with one specific issue — school desegregation. We will use them to see how the analysis of the equal protection clause evolves to meet the continuing challenges of our democratic society.

SLAVE, CITIZEN, PERSON

The Dred Scott case was decided four years before the Civil War began. It raised the question "can a negro be a citizen of the United States?" Dred Scott was a negro slave who was brought by his master to Illinois, a free state, and then returned by him to Missouri. Dred Scott sued in Missouri State Court and then in Federal Court, arguing that being in Illinois had the effect of emancipation and he could not be re-enslaved by being returned to Missouri. The United States Supreme Court decided that Dred Scott was not a citizen and could never be a citizen because of his race. He therefore had no right to sue in U.S. courts. This meant that there was no way that Dred Scott could get a court to rule on his argument that he was a free man. He remained a slave for the rest of his life.

Dred Scott v. Sandford

60 U.S. (19 How.) 393 (1857)

TANEY, J. delivered the opinion of the court

....The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

It will be observed, that the *case* applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. ...

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether *negroes* compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

***

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. *N*o one seems to have doubted the correctness of the prevailing opinion of the time.

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The language of the Declaration of Independence is equally conclusive:

It begins by declaring that, "when in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation."

It then proceeds to say: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed."

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men — high in literary acquirements, high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. ...

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.

The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares that it is formed by the people of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the people of the United States, and of citizens of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen, and one of the people. It uses them as terms so well understood, that no further description or definition was necessary.

But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808, if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. By the first above-mentioned clause, therefore, the right to purchase and hold this property is directly sanctioned and authorized for twenty years by the people who framed the Constitution. And by the second, they pledge themselves to maintain and uphold the right of the master in the manner specified, as long as the Government they then formed should endure. And these two provisions show, conclusively, that neither the description of persons therein referred to, nor their descendants, were embraced in any of the other provisions of the Constitution; for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.

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And upon a full and careful consideration of the subject, the court is of the opinion, that, upon the facts stated...Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment *of the Circuit Court* is erroneous....

Equal Protection Equals Separate but Equal: the United States Constitution

Although the Fourteenth Amendment made black persons citizens and guaranteed them equal protection under the law, blacks had a great deal of difficulty actually achieving the rights given by the Constitution. In the years following the passage of the Amendment, many states passed "Jim Crow" laws requiring segregation of the races. States provided separate public facilities for whites and blacks and argued that there was no constitutional violation as long as the facilities were equal. Of course they seldom were.

In Louisiana in 1892, state law provided that railroad companies had to provide equal but separate accommodations for blacks and whites, either in separate cars or by partitioning single cars into two separate sections. Even if a black and a white were travelling together, they had to separate as the train went through Louisiana. A person insisting on riding in a car or section "to which by race he does not belong" was liable for a fine or imprisonment.

Homer Plessy boarded a train in Louisiana on June 7, 1892 and seated himself in a white car. Mr. Plessy was 1/8 black and 7/8 white and considered himself to be white. He refused to move to the black car when asked and was forcibly removed from the train. He was charged with a criminal violation of Louisiana law and jailed. After being convicted in state court he appealed his case to the U.S. Supreme Court.

Plessy v. Ferguson
163 U.S. 537 (1896)

Mr. Justice Brown delivered the opinion of the court.

This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. ...

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The constitutionality of this act is attacked upon the ground that it conflicts ... with the ... Fourteenth Amendment.

***

The object of the *Fourteenth* Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of Roberts v. City of Boston, 5 Cush. 198, in which the Supreme Judicial Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools.

***

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is property, in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

***

...Every exercise of the police power *(the power to pass laws related to the public's general welfare)* must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class. ... So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances in unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. ... The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. ... If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

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Affirmed.

Mr. Justice Harlan dissenting.

By the Louisiana statute, ...the State regulates the use of a public highway by citizens of the United States solely upon the basis of race.

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States.

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In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. ... But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation, as that here in question, is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States.

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty, by declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside" and that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. ...

***

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travellers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. "Personal liberty," it has been well said, "consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law." ... If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

***

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I do not doubt, it will continue to be for all time, if it remains true to its great heritage and hold fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case.

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The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.

...We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

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I am of the opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the spirit and letter of the Constitution of the United States.

For the reasons stated, I am constrained to withhold my assent from the opinion and judgment of the majority.

Equal Protection Equals Separate But Equal: the Massachusetts State Constitution

In a case decided before the Civil War and before the passage of the Fourteenth Amendment, the Massachusetts court ruled that Americans of African descent had equal rights under the Massachusetts constitution. The court then had to decide if segregated schools violated these rights. The court found that the black schools were comparable in every way to the white schools and therefore did not violate the state constitution. This was, in effect, the first articulation of the "separate but equal" doctrine, which was later institutionalized as the law of the land by the U.S. Supreme Court in Plessy v. Ferguson.

Sarah C. Roberts v. City of Boston

5 Cush. 198 (1850)

Chief Justice Shaw delivered the opinion of the Court.

Shaw, C. J. The plaintiff, a colored child of five years of age, has commenced this action, by her father...against the city of Boston, upon the statute...which provides, that any child unlawfully excluded from public school instruction, in this commonwealth, shall recover damages therefor, in an action against the city or town, by which such public school instruction is supported. The question therefore is, whether...the plaintiff has been unlawfully excluded from such instruction.

*I*t appears, that the defendants support a class of schools called primary schools, to the number of about one hundred and sixty, designed for the instruction of children of both sexes, who are between the ages of four and seven years. Two of these schools are appropriated by the primary school committee...to the exclusive instruction of colored children, and the residue to the exclusive instruction of white children. The plaintiff, by her father, took proper measures to obtain admission into one of these schools appropriated to white children, but pursuant to the regulations of the committee, and in conformity therewith, she was not admitted. Either of the schools appropriated to colored children was open to her; the nearest of which was about a fifth of a mile or seventy rods more distant from her father's house than the nearest primary school.

...The plaintiff had access to a school, set apart for colored children, as well conducted in all respects, and as well fitted, in point of capacity and qualification of the instructors, to advance the education of children under seven years old, as the other primary schools; the objection is, that the schools thus open to the plaintiff are exclusively appropriated to colored children, and are at a greater distance from her home. Under these circumstances, has the plaintiff been unlawfully excluded from public school instruction? Upon the best consideration we have been able to give the subject, the court are all of opinion that she has not.

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The great principle, advanced by the learned and eloquent advocate of the plaintiff, is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. This, as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound; it is not only expressed in terms, but pervades and animates the whole spirit of our constitution of free government. ...

Conceding...that colored persons, the descendants of Africans, are entitled by law, in this commonwealth, to equal rights, constitutional and political, civil and social, the question then arises, whether the regulation in question, which provides separate schools for colored children, is a violation of any of these rights.

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In the absence of special legislation on this subject, the law has vested the power in the *school* committee to regulate the system of distribution and classification; and when this power is reasonably exercised, without being abused or perverted by colorable pretenses, the decision of the committee must be deemed conclusive. The committee, apparently upon great deliberation, have come to the conclusion, that the good of both classes of schools will be best promoted, by maintaining the separate primary schools for colored and for white children, and we can perceive no ground to doubt, that this is the honest result of their experience and judgment.

It is urged, that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste; founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence, and we cannot say, that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgement.

The increased distance, to which the plaintiff was obliged to go to school from her father's house, is not such, in our opinion, as to render the regulation in question unreasonable, still less illegal.

On the whole the court are of opinion, that upon the facts stated, the action cannot be maintained.

Separate is Unequal

For more than 50 years, it was enough, for puposes of equal protection, for states to provide "separate but equal" facilities. By the 1950's, though, segregation in education was being challenged on several fronts. In cases involving colleges and universities, the Supreme Court had ruled that the equal protection rights of students had been violated because, for example, the segregated college or law school was not, in fact, providing an equal education. The separate but equal doctrine had not been challenged directly. To do so would be to ask the Supreme Court to overrule Plessy v. Ferguson; only rarely does the Supreme Court overturn its prior decisions. But that's exactly what happened in Brown v. Board of Education.

Linda Brown lived five blocks from her neighborhood elementary school in Topeka, Kansas. But this was a school for white children and Linda was black. The black school that she was assigned to was 22 blocks from her home. Her parents unsuccessfully attempted to enroll her in the white school. They then sued the school board. The case, along with several other similar cases from around the country, made its way through the state and lower federal Courts to the Supreme Court. Thurgood Marshall, who represented the black children and their parents and who later became the first black justice of the Supreme Court, argued that segregated schools, without regard to whether they were equal or not, harmed black children and therefore violated their Fourteenth Amendment rights to equal protection of the law. The school boards argued that "separate but equal" was still the law of the land and equal segregated facilities did not violate the Constitution. The Supreme Court, in a unanimous decision, held that separate educational facilities were inherently unequal, thereby overruling its decision in Plessy.

The Court did not decide, in Brown I, questions about how schools that had been segregated for years were to be desegregated. The Court left the Brown case on its docket, asking the parties to address these questions in a second hearing. One year later, in Brown v. Board of Education II, the Court said that in order to be in compliance with the Constitution, states had to integrate public schools "with all deliberate speed." There has been persistent and tremendous resistance to the Court's order. Thirty-five years later, the Court is still hearing school desegregation cases. The Court's opinions in Brown I and Brown II and their successors follow.

Brown v. Board of Education of Topeka (Brown I)
347 U.S. 483 (1954)

Mr. Chief Justice Warren delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in Plessy v. Ferguson, 163 U.S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost non-existent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson...involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. In Cumming v. County Board of Education...and Gong Lum v. Rice...the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. Missouri ex. rel Gaines v. Canada...; Sipuel v. Oklahoma...; Sweatt v. Painter...; McLaurin v. Oklahoma State Regents... . In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in Sweatt v. Painter...the Court expressly reserved decision on the question whether Plessy v. Ferguson should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike Sweatt v. Painter, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on those qualities which are incapable of objective measurement but which make for greatness in law school. In McLaurin v. Oklahoma State Regents, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: "... his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession." Such considerations apply with added force to children in grade and high school. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.

Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question — the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on *the questions of how to bring about desegregated schools*. The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.

It is so ordered.

Desegregation: Getting There "with all deliberate speed"

Brown v. Board of Education of Topeka (Brown II)
349 U.S. 294 (1955)

Mr. Chief Justice Warren delivered the opinion of the Court.

These cases were decided on May 17, 1954. The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded.

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Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

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...At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases. The judgment in the Delaware case — ordering the immediate admission of the plaintiffs to schools previously attended only by white children — is affirmed on the basis of the principles stated in our May 17, 1954 opinion, but the case is remanded to the Supreme Court of Delaware for such further proceedings as that Court may deem necessary in light of this opinion.

It is so ordered.

Desegregation: Is Any Speed Too Fast?

In Brown II, decided in 1955, the Supreme Court ordered states to desegregate their schools "with all deliberate speed." In Little Rock, Arkansas, the school board had proposed a plan which required gradual desegregation; the first step would be the admission of nine black students to Central High School. The community had agreed, albeit reluctantly, to the plan and the District Court entered an Order which put the plea into effect. However, Governor Orval Faubus was opposed to any integration. He called out the National Guard, who surrounded the school and prevented the black students from entering.

Elizabeth Eckford was one of the nine black students. She describes the first day as she tried to enter Central High School:

> ...I caught the bus and got off a block from the school. I saw a large crowd of people standing across the street from the soldiers guarding Central. As I walked on, the crowd suddenly got very quiet. I looked at all the people and thought, 'Maybe I will be safer if I walk down the block to the front entrance.' The crowd moved in closer and then began to follow me, calling me names... . I still wasn't too scared because I kept thinking that the guards would protect me. I walked until I was right in front of the path to the front door... . Just then the guards let some white students go through. I walked up to the guard who had let the white students in. He didn't move. When I tried to squeeze past him, he raised his bayonet and then the other guards closed in and they raised their bayonets. They glared at me with a mean look and I was very frightened and didn't know what to do. I turned around and the crowd came toward me. They moved closer. Somebody started yelling, 'Lynch her! Lynch her!'

Although Governor Faubus finally agreed to remove the National Guard, he would not agree to protect the black students. Severe riots broke out. President Eisenhower sent Federal troops to Little Rock to enforce the Court's Order, protect the nine students and prevent further riots.

After a year of chaos and violence, the Little Rock school board petitioned the District Court for permission to withdraw the black students and postpone implementation of the desegregation plan until the city calmed down. The District Court granted the request, but the Supreme Court reversed that decision, ruling that the illegal actions of the Governor could not be allowed to nullify the Court's desegregation Order.

Cooper v. Aaron
358 U.S. I (1958)

Opinion of the Court by Chief Justice Warren, joined by all justices.

As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution. Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in Brown v. Board of Education, 347 U.S. 483. That holding was that the Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property. We are urged to uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify our holding in Brown v. Board of Education have been further challenged and tested in the courts. We reject these contentions.

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We come now to the aspect of the proceedings presently before us. On February 20,1958, the School Board and the Superintendent of Schools filed a petition in the District Court seeking a postponement of their program for desegregation. Their position in essence was that because of extreme public hostility, which they stated had been engendered largely by the official attitudes and actions of the Governor and the Legislature, the maintenance of a sound educational program at Central High School, with the Negro students in attendance, would be impossible. The Board therefore proposed that the Negro students already admitted to the school be withdrawn and sent to segregated schools, and that all further steps to carry out the Board's desegregation program be postponed for a period later suggested by the Board to be two and one-half years.

After a hearing the District Court granted the relief requested by the Board. Among other things the court found that the past year at Central High School had been attended by conditions of "chaos, bedlam and turmoil"; that there were "repeated incidents of more or less serious violence directed against the Negro students and their property"; that there was "tension and unrest among the school administrators, the class-room teachers, the pupils, and the latters' parents, which inevitably had an adverse effect upon the educational program"; that a school official was threatened with violence; that a "serious financial burden" has been cast on the School District; that the education of the students had suffered "and under existing conditions will continue to suffer"; that the Board would continue to need "military assistance or its equivalent"; that the local police department would not be able "to detail enough men to afford the necessary protection"; and that the situation was "intolerable."

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... We have accepted without reservation the position of the School Board, the Superintendent of Schools, and their counsel that they displayed entire good faith in the conduct of these proceedings and in dealing with the unfortunate and distressing sequence of events which has been outlined. We likewise have accepted...that the educational progress of all the students, white and colored, of that school has suffered and will continue to suffer if the conditions which prevailed last year are permitted to continue.

The significance of these findings, however, is to be considered in light of the fact, indisputably revealed by the record before us, that the conditions they depict are directly traceable to the actions of legislators and executive officials of the State of Arkansas, taken in their official capacities, which reflect their own determination to resist this Court's decision in the Brown case and which have brought about violent resistance to that decision in Arkansas. In its petition for certiorari filed in this Court, the School Board itself describes the situation in this language: "The legislative, executive, and judicial departments of the state government opposed the desegregation of Little Rock schools by enacting laws, calling out troops, making statements vilifying federal law and federal courts, and failing to utilize state law enforcement agencies and judicial processes to maintain public peace."

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The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. ...*Law* and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties as counsel for the Board forthrightly conceded on the oral argument in this Court, can also be brought under control by state action.

The controlling legal principles are plain. The command of the Fourteenth Amendment is that no "State" shall deny to any person within its jurisdiction the equal protection of the laws. "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, ...denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning."... Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action. ... In short, the constitutional rights of children not to be discriminated against in school admission on ground of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." ...

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Concurring opinion of Mr. Justice Frankfurter.

While unreservedly participating with my brethren in our joint opinion, I deem it appropriate also to deal individually with the great issue here at stake.

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We are now asked to hold that the illegal, forcible interference by the State of Arkansas with the continuance of what the Constitution commands, and the consequences in disorder that it entrained, should be recognized as justification for undoing what the School Board had formulated, what the District Court in 1955 had directed to be carried out, and what was in process of obedience. No explanation that may be offered in support of such a request can obscure the inescapable meaning that law should bow to force. To yield to such a claim would be to enthrone official lawlessness, and lawlessness if not checked is the precursor of anarchy. On the few tragic occasions in the history of the Nation, North and South, when law was forcibly resisted or systematically evaded, it has signalled the breakdown of constitutional processes of government on which ultimately rest the liberties of all. Violent resistance to law cannot be made a legal reason for its suspension without loosening the fabric of our society. What could this mean but to acknowledge that disorder under the aegis of a State has moral superiority over the law of the Constitution? For those in authority thus to defy the law of the land is profoundly subversive not only of our constitutional system but of the presuppositions of a democratic society. ...

Desegration: What Means to the End?

Much of the desegregation litigation from the period following Brown in 1954 through the 1980s dealt with questions of how desegregation would be accomplished, how quickly, and what powers the federal courts had to oversee the process.

In Green v. New Kent County, the Supreme Court reviewed a "freedom-of-choice" plan to desegregate schools in a rural county in eastern Virginia. The county operated a white school and a black school, each of which was a combined elementary and high school. To remedy the segregation, the county school board adopted a plan where each year students could choose which school they would attend. Needless to say, whites chose the white school and most blacks (85%) continued to choose the black school, even after three years of the plan's operation. The Supreme Court did not accept the plan as sufficient to desegregate the school system.

In Swann v. Charlotte-Mecklenburg Board of Education, the Court laid out specific guidelines for school desegregation. The central issue was student assignment and, in particular, busing students throughout the district to achieve racial balance. In a unanimous decision, the Court upheld the desegregation plan imposed by the District Court, which included extensive busing. In doing so, the Court empowered the lower federal courts to include busing as one of the tools in the arsenal of remedies to achieve desegregation. Excerpts from the opinions in Green and Swann follow.

Green v. County School Board
391 U.S. 430 (1968)

BRENNAN, J., delivered the opinion of the Court.

The question for decision is whether, under all the circumstances here, *the* School Board's adoption of a "freedom-of-choice" plan which allows a pupil to choose his own public school constitutes adequate compliance with the Board's responsibility "to achieve a system of determining admission to the public schools on a non-racial basis." ...

...New Kent County is a rural county in Eastern Virginia. About one-half of its population of some 4,500 are Negroes. There is no residential segregation in the county; persons of both races reside throughout. The school system has only two schools, the New Kent school on the east side of the county and the George W. Watkins school on the west side. ...*The* District Court found that the "school system serves approximately 1,300 pupils, of which 740 are Negro and 550 are White. The School Board operates one white combined elementary and high school (New Kent), and one Negro combined elementary and high school (George W. Watkins). There are no attendance zones. Each school serves the entire county."...

* * *

In 1965, ...the School Board, in order to remain eligible for federal financial aid, adopted a "freedom-of-choice" plan for desegregating the schools. Under that plan, each pupil, except those entering the first and eighth grades, may annually choose between the New Kent and Watkins schools and pupils not making a choice are assigned to the school previously attended; first and eighth grade pupils must affirmatively choose a school.

* * *

...*I*t is relevant that this first step did not come until some 11 years after Brown I was decided and 10 years after Brown II directed the making of a "prompt and reasonable start." This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable. ... Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. ...The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now. ...

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The New Kent School Board's "freedom-of-choice" plan cannot be accepted as a sufficient step to "effectuate a transition" to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which Brown II placed squarely on the School Board. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as *attendance* zoning, fashion steps which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools. ...

Swann v. Charlotte-Mecklenburg Board of Education

402. U.S. 1 (1971)

BURGER, C.J., delivered the opinion of the Court.

We *accepted this case* to review important issues as to the duties of school authorities and the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action.

This case and those argued with it arose in States having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what Brown v. Board of Education was all about. These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing Brown I and the mandate to eliminate dual systems and establish unitary systems at once. Meanwhile district courts and courts of appeals have struggled in hundreds of cases with a multitude and variety of problems under this Court's general directive. Understandably, in an area of evolving remedies, those courts had to improvise and experiment without detailed or specific guidelines. This Court, in Brown I, appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts, of necessity, embraced a process of "trial and error," and our effort to formulate guidelines must take into account their experience.

The Charlotte-Mecklenburg school system, encompasses the city of Charlotte and surrounding Mecklenburg County, North Carolina. ...Approximately 71% of the pupils were found to be white and 29% Negro. ...Two-thirds of these...*Negro students* attended 21 schools which were either totally Negro or more than 99% Negro.

***

In seeking to define even in broad and general terms how far *the court's* remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities... . Judicial authority enters only when local authority defaults.

***

We turn now to the problem of defining with more particularity the responsibilities of school authorities in desegregating a state-enforced dual school system in light of the Equal Protection Clause.

***

The central issue in this case is that of student assignment, and there are essentially four problem areas:

(1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;

(2) whether every all-Negro and all-white school must be eliminated as anindispensable part of a remedial process of desegregation;

(3) what the limits are, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and

(4) what the limits are, if any, on the use of transportation facilities to correct state-enforced racial school segregation.

(1) Racial Balances or Racial Quotas.

The constant theme and thrust of every holding from Brown I to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. The remedy commanded was to dismantle dual school systems.

***

In this case it is urged that the District Court has imposed a racial balance requirement of 71%-29% on individual schools. ...

***

...As we said in Green, a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations. In sum, the very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court.

(2) One-race Schools.

The record in this case reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change.

...The existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. ...

***

(3) Remedial Altering of Attendance Zones.

The maps submitted in these cases graphically demonstrate that one of the principal tools employed by school planners and by courts to break up the dual school system has been a frank— and sometimes drastic — gerrymandering of school districts and attendance zones. An additional step was pairing, "clustering," or "grouping" of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and transfer of white students to formerly all-Negro schools. More often than not, these zones are neither compact nor contiguous; indeed they may be on opposite ends of the city. As an interim corrective measure, this cannot be said to be beyond the broad remedial powers of a court.

***

(4) Transportation of Students.

The scope of permissible transportation of students as an implement of a remedial decree has never been defined by this Court and by the very nature of the problem it cannot be defined with precision. ...

***

The *District Court's* decree provided that the buses used to implement the plan would operate on direct routes. Students would be picked up at schools near their homes and transported to the schools they were to attend. The trips for elementary school pupils average about seven miles and the District Court found that they would take "not over 35 minutes at the most." ...In these circumstances, we find no basis for holding that the local school authorities may not be required to employ bus transportation as one tool of school desegregation. Desegregation plans cannot be limited to the walk-in school.

***

At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in Brown I. The systems would then be "unitary"... .

It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

Desegregation: When is the End Achieved?

In the next case, the Oklahoma City Board of Education asked that the desegregation order under which it had operated since 1972 be ended. The federal District Court had ruled in 1977 that the system had achieved "unitary" status, but in 1984, the Board put in place a new plan to place students in grades K-4 in neighborhood schools. The new plan ended the busing of students in those grades which had resulted in more integration. Because of housing patterns, however, the return to neighborhood schools resulted in the reappearance of many one-race schools. Parents of Afro-American students sued, arguing that the 1977 ruling of "unitary" status had not ended the original desegregation order and that the Board's new plan violated that order.

The Supreme Court split 5-3 in deciding the case. The justices disagreed on the standard or test to be used in deciding whether a desegregation order should be ended. Excerpts from the majority and the dissent follow.

Board of Education of Oklahoma City v. Dowell
59 U.S.L.W. 4061 (1991)

REHNQUIST, C.J., delivered the opinion of the Court, joined by White, O'Connor, Scalia, and Kennedy.

This school desegregation litigation began almost 30 years ago. In 1961, black students and their parents sued...the Board to end de jure segregation in the public schools. In 1963, the District Court found that Oklahoma City had intentionally segregated both schools and housing in the past, and that Oklahoma City was operating a "dual" school system—one that was intentionally segregated by race. ...In 1965, the District Court found that the School Board's attempt to desegregate by using neighborhood zoning failed to remedy past segregation because residential segregation resulted in one-race schools. ... The District Court found that school segregation had caused some housing segregation. ... In 1972, finding that previous efforts had not been successful at eliminating state imposed segregation, the District Court ordered the Board to adopt *a specific desegregation plan.*

***

In 1984, the School Board faced demographic changes that led to greater burdens on young black children. As more and more neighborhoods became integrated, more stand-alone schools were established, and young black students had to be bused further from their inner-city homes to outlying white areas. In an effort to alleviate this burden and to increase parental involvement, the Board adopted the Student Reassignment Plan (SRP), which relied on neighborhood assignments for students in grades K-4 beginning in the 1985-1986 school year. Busing continued for students in grades 5-12. ...

In 1985, respondents...*contended* that the School District had not achieved "unitary" status and that the SRP was a return to segregation. Under the SRP, 11 of 64 elementary school schools would be greater than 90% black, 22 would be greater than 90% white plus other minorities, and 31 would be racially mixed. ...The District Court found that...unitariness had been achieved, *and* the District Court concluded that court-ordered desegregation must end.

***

The lower courts have been inconsistent in their use of the term "unitary." Some have used it to identify a school district that has completely remedied all vestiges of past discrimination.

...Other courts, however, have used "unitary" to describe any school district that has currently desegregated student assignments, whether or not that status is solely the result of a court-imposed desegregation plan. ... In other words, such a school district could be called unitary and nevertheless still contain vestiges of past discrimination. ...

We think it is a mistake to treat words such as "dual" and "unitary" as if they were actually found in the Constitution. The constitutional command of the Fourteenth Amendment is that "*no* State shall ... deny to any person ... the equal protection of the laws." Courts have used the terms "dual" to denote a school system which has engaged in intentional segregation of students by race, and "unitary" to describe a school system which has been brought into compliance with the command of the Constitution. ...

***

From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination. Brown considered the "complexities arising from the transition to a system of public education freed of racial discrimination" in holding that the implementation of desegregation was to proceed "with all deliberate speed."

***

...The legal justification for displacement of local authority by *a court* decree in a school desegregation case is a violation of the Constitution by the local authorities. Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination." ...

***

...In this case the original finding of de jure segregation was entered in 1961, the...decree from which the Board seeks relief was entered in 1972, and the Board complied with the decree in good faith until 1985. Not only do the personnel of school boards change over time, but the same passage of time enables the District Court to observe the good faith of the school board in complying with the decree. The test espoused by the Court of Appeals would condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future. Neither *equity*...nor the commands of the Equal Protection Clause of the Fourteenth Amendment, require any such Draconian result.

...We think that the preferable course is to remand the case to *the District* court so that it may decide...whether the Board made a sufficient showing of constitutional compliance as of 1985, when the SRP was adopted, to allow the *decree* to be dissolved. The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.

The judgment of the Court of Appeals is reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion.

MARSHALL, J., dissenting, joined by Blackmun and Stevens.

...The practical question now before us is whether, 13 years after *the desegregation decree* was imposed, the same School Board should have been allowed to return many of its elementary schools to their former one-race status. The majority today suggest that 13 years of desegregation was enough. ...

***

...In my view, a standard for dissolution of a desegregation decree must take into account the unique harm associated with a system of racially identifiable schools and must expressly demand the elimination of such schools.

Our pointed focus in Brown I upon the stigmatic injury caused by segregated schools explains our unflagging insistence that formerly de jure segregated school districts extinguish all vestiges of school segregation. The concept of stigma also gives us guidance as to what conditions must be eliminated before a decree can be deemed to have served its purpose.

***

...Against the background of former state-sponsorship of one-race schools, the persistence of racially identifiable schools perpetuates the message of racial inferiority associated with segregation. Therefore, such schools must be eliminated whenever feasible.

It is undisputed that replacing the *desegregation plan* with a system of neighborhood school assignments for grades K-4 resulted in a system of racially identifiable schools. Under the SRP, over one-half of Oklahoma City's elementary schools now have student bodies that are either 90% Afro-American or 90% non-Afro-American. Because this principal vestige of de jure segregation persists, lifting the decree would clearly be premature at this point. ...

The majority equivocates on the effect to be given to the reemergence of racially identifiable schools. ... This equivocation is completely unsatisfying.

***

I also reject the majority's suggestion that the length of federal judicial supervision is a valid factor in assessing a dissolution. The majority is correct that the Court has never contemplated perpetual judicial oversight of former de jure segregated school districts. Our jurisprudence requires, however, that the job of school desegregation be fully completed and maintained so that the stigmatic harm identified in Brown I will not recur upon lifting the decree. Any doubt on the issue whether the School Board has fulfilled its remedial obligations should be resolved in favor of the Afro-American children affected by this litigation.

In its concern to spare local school boards the "Draconian" fate of "indefinite" "judicial tutelage," the majority risks subordination of the constitutional rights of Afro-American children to the interest of school board autonomy. ...

***

Consistent with the mandate of Brown I, our cases have imposed on school districts an unconditional duty to eliminate any condition that perpetuates the message of racial inferiority inherent in the policy of state-sponsored segregation. The racial identifiability of a district's schools is such a condition. Whether this "vestige" of state-sponsored segregation will persist cannot simply be ignored at the point where a district court is contemplating the dissolution of a desegregation decree. In a district with history of state-sponsored school segregation, racial separation, in my view remains inherently unequal.

I dissent.

Is The Constitution Color Blind?

In recent years the Supreme Court has returned to a theme in Justice Harlan's dissent in Plessy v. Ferguson: the Constitution is colorblind. In the Plessy dissent, that principle was a call to end laws which required or supported segregation of the races. "Affirmative action" has been one approach to achieving integration. In the area of employment, affirmative action means concrete steps to increase the number of minority persons in occupations and positions traditionally dominated by whites. In the affirmative action cases of recent years, the concept of a colorblind Constitution has been used to strike down preferential treatment of minorities and to protect the white majority from "reverse discrimination." The Court has been divided on the issue of race consciousness in Constitutional jurisprudence.

Allan Bakke, a white male, applied to medical school at the University of California at Davis. He was denied admission, though he was otherwise qualified, because of the University's special admissions program for minorities. There weren't any seats left for qualified white applicants by the time Bakke's application was considered. He sued the University for denying him equal protection of the laws under the Fourteenth Amendment to the Constitution.

The Supreme Court in the Bakke case considered two primary issues: whether the Equal Protection clause protects members of the white majority from "reverse discrimination"; and whether a less exacting level of judicial scrutiny could be applied to a preferential admissions program benefitting minority group members. The Court also considered whether race could ever be a factor in a university admissions program.

The Court split on these issues. Five justices agreed that the preferential admissions program was unlawful, directing Bakke's admission to medical school. Five justices agreed that a university may consider race in making admissions decisions. Justice Powell wrote the plurality opinion for the Court; excerpts follow, as do excerpts from the dissenting opinions of Justice Marshall and Justice Blackmun. Justice Marshall's dissent offers a counterpoint to Justice Powell's opinion, which holds that racial classification is always subject to strict judicial scrutiny, whether or not such classifications are intended to benefit the minority race. Justice Marshall, tracing the history of slavery and later the Jim Crow laws sanctioned by the Court until the 1954 Brown I decision, would hold that this legacy of discrimination is sufficient to justify race-based classifications where the purpose is to remedy discrimination, as in the preferential admissions program at U.C.-Davis.

Justice Blackmun's dissenting opinion puts affirmative action in the context of equal protection. He says the original aims of the Fourteenth Amendment can't be fulfilled by a "colorblind" Constitution. He argues that we cannot "let the Equal Protection Clause perpetrate racial supremacy."

Regents of the University of California v. Bakke

438 U.S. 265 (1978)

POWELL, announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission of a specified number of students from certain minority groups. ...

***

The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class was increased to 100 students, a level at which it remains. No admissions program for disadvantaged or minority students existed when the school opened, and the first class contained three Asians but no blacks, no Mexican-

Americans and no American Indians. Over the next two years, the faculty devised a special admissions program to increase the representation of "disadvantaged" students in each medical school class. The special program consisted of a separate admissions system operating in coordination with the regular admissions process.

***

Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment. ...The parties do disagree as to the level of judicial scrutiny to be applied to the special admissions program.

***

En route to this crucial battle over the scope of judicial review, the parties fight a sharp preliminary action over the proper characterization of the special admissions program. *The University* prefers to view it as establishing a "goal" of minority representation in the Medical School. *Bakke*, echoing the courts below, labels it a racial quota.

This semantic distinction is beside the point; the special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.

...Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history. ...

***

Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority,"...the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude. ...Indeed, it is not unlikely that among the Framers were many who would have applauded a reading of the Equal Protection Clause that states a principle of universal application and is responsive to the racial, ethnic, and cultural diversity of the Nation. ...

Over the past 30 years, this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons "the protection of equal laws,"...in a Nation confronting a legacy of slavery and racial discrimination. ...

***

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign." The clock of our liberties, however, cannot be turned back to 1868. ...It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. ... Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.

Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. ...Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. ...Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.

***

Petitioner contends that on several occasions this Court has approved preferential classifications without applying the most exacting scrutiny. Most of the cases upon which petitioner relies are drawn from three areas: school desegregation, employment discrimination, and sex discrimination. Each of the cases cited presented a situation materially different from the facts of this case.

***

Moreover, the operation of petitioner's special admissions program is quite different from the remedial measures approved in those cases. It prefers the designated minority groups at the expense of other individuals who are totally foreclosed from competition for the 16 special admissions seats in every Medical School class. Because of that foreclosure, some individuals are excluded from enjoyment of a state-provided benefit—admission to the Medical School—they otherwise would receive. When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect.

***

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin..., that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. *The University* has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.

In enjoining *the University* from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

With respect to *Bakke's* entitlement to an injunction directing his admission to the Medical School, ...*he* is entitled to the injunction, and that portion of the judgment must be affirmed.

MARSHALL, J., separate opinion.

I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.

The denial of human rights was etched into the American Colonies' first attempts at establishing self-government. When the colonists determined to seek their independence from England, they drafted a unique document cataloguing their grievances against the King and proclaiming as "self-evident" that "all men are created Equal" and are endowed "with certain unalienable Rights," including those to "Life, Liberty and the pursuit of Happiness." The self-evident truths and the unalienable rights were intended, however, to apply only to white men.

***

The implicit protection of slavery embodied in the Declaration of Independence was made explicit in the Constitution, which treated a slave as being equivalent to three-fifths of a person for purposes of apportioning representatives and taxes among the States. Art I, Sec. 2. The Constitution also contained a clause ensuring that the "Migration or Importation" of slaves into the existing States would be legal until at least 1808, Art I, Sec. 9, and a fugitive slave clause requiring that when a slave escaped to another State, he must be returned on the claim of the master, Art IV, Sec. 2. In their declaration of the principles that were to provide the cornerstone of the new Nation, therefore, the Framers made it plain that "we the people," for whose protection the Constitution was designed, did not include those whose skins were the wrong color. ...

***

The status of the Negro as property was officially erased by his emancipation at the end of the Civil War. But the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." ...Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those Amendments were supposed to secure. The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War.

***

The Court's ultimate blow to the Civil War Amendments and to the equality of Negroes came in Plessy v. Ferguson. In upholding a Louisiana law that required railway companies to provide "equal but separate" accommodations for whites and Negroes, the Court held that the Fourteenth Amendment was not intended "to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." ...

***

Mr. Justice Harlan's dissenting opinion recognized the bankruptcy of the Court's reasoning. ...He expressed his fear that if like laws were enacted in other States, "the effect would be in the highest degree mischievous."...

***

The fears of Mr. justice Harlan were soon to be realized. In the wake of Plessy, many States expanded their Jim Crow laws, which had up until that time been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts. In 1898, after Plessy, the Charlestown News and Courier printed a parody of Jim Crow laws:

> 'If there must be Jim Crow cars on the railroads, there should be Jim Crow cars on the street railways. Also on all passenger boats. ... If there are to be Jim Crow cars, moreover, there should be Jim Crow waiting saloons at all stations, and Jim Crow eating houses. ... There should be Jim Crow sections of the jury box, and a separate Jim Crow dock and witness stand in every court—and a Jim Crow Bible for colored witnesses to kiss.'

The irony is that before many years had passed, with the exception of the Jim Crow witness stand, "all the improbable applications of the principle suggested by the editor in derision had been put into practice—down to and including the Jim Crow Bible."...

Nor were the laws restricting the rights of Negroes limited solely to the Southern States. In many of the Northern States, the Negro was denied the right to vote, prevented from serving on juries, and excluded from theaters, restaurants, hotels, and inns. Under President Wilson, the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated. When his segregationist policies were attacked, President Wilson responded that segregation was " not humiliating but a benefit " and that he was " rendering [the Negroes] more safe in their possession of office and less likely to be discriminated against. "...

The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were for the most part confined to separate military units; it was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools—and thereby denied the opportunity to become doctors, lawyers, engineers, and the like—is also well established. It is of course true that some of the Jim Crow laws (which the decisions of this Court had helped to foster) were struck down by this Court in a series of decisions leading up to Brown v. Board of Education. ...Those decisions, however, did not automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality. The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.

***

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that Americans will forever remain a divided society.

I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.

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BLACKMUN, J., separate opinion.

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I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most. But the story of Brown v. Board of Education, decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive but that is behind us.

***

I, of course, accept the propositions that (a) Fourteenth Amendment rights are personal; (b) racial and ethnic distinctions where they are stereotypes are inherently suspect and call for exacting judicial scrutiny; (c) academic freedom is a special concern of the First Amendment; and (d) the Fourteenth Amendment has expanded beyond its original 1868 concept. ...

This enlargement does not mean for me, however, that the Fourteenth Amendment has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what "affirmative action," in the face of proper facts, is all about. If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area. In this sense, constitutional equal protection is a shield.

***

I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy.

***

The deeply divided Supreme Court in Bakke v. Board of Regents did not definitively answer the question whether the Constitution is colorblind. The Court confronted the issue again in the next case, in which the City of Richmond established a plan which required that any construction contractor doing business with the City had to subcontract at least 30% of its business to a minority-owned construction company. The Court was again divided, particularly on the grounds by which the Richmond plan was struck down. A six-justice majority agreed that the City's preferential plan violated the Constitution, but the justices had different reasons for their shared conclusion. Justice Marshall, writing for the three dissenters, said that the majority's decision "marks a deliberate and giant step backward in this Court's affirmative action jurisprudence." Excerpts from the opinions of two majority justices and from the dissent follow.

City of Richmond v. J.A. Croson Company

488 U.S. 469 (1989)

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the court.

In this case, we confront once again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society. ...

* * *

On April 11, 1983, the Richmond City Council adopted the Minority Business Utilization Plan (the Plan). The Plan required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBEs). ...

* * *

There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors.

* * *

The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall...deny to any person within its jurisdiction the equal protection of the laws". ...

As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." ...The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. ... We thus reaffirm...that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification.

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The City of Richmond argues that it is attempting to remedy various forms of past discrimination that are alleged to be responsible for the small number of minority businesses in the local contracting industry. ...

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While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts in Richmond, Virginia. Like the claim that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.

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In sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. ...We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

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Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. ...In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

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...Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause.

SCALIA, J., concurring in the judgment.

I agree with much of the Court's opinion, and, in particular, with its conclusion that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is "remedial" or "benign."... I do not agree, however, with the Court's dicta suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) "to ameliorate the effects of past discrimination."... The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination that can other assertively benign purposes we have repeatedly rejected. ...The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency — fatal to a nation such as ours — to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all. ...At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb — for example, a prison race riot, requiring temporary segregation of inmates — can justify an exception to the principle embodied in the Fourteenth Amendment that "our Constitution is color-blind, and neither knows nor tolerates classes among citizens."...

In my view there is only one circumstance in which the States may act by race to "undo the effects of past discrimination": where that is necessary to eliminate their own maintenance of a system of unlawful racial classification. ...This distinction explains our school desegregation cases, in which we have made plain that States and localities sometimes have an obligation to adopt race-conscious remedies. ...

MARSHALL, J., with whom Brennan and Blackmun join, dissenting.

It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst. In my view, nothing in the Constitution can be construed to prevent Richmond, Virginia, from allocating a portion of its contracting dollars for businesses owned or controlled by members of minority groups. ...

A majority of this Court holds today, however, that the Equal Protection Clause of the Fourteenth Amendment blocks Richmond's initiative. The essence of the majority's position is that Richmond has failed to catalogue adequate findings to prove that past discrimination has impeded minorities from joining or participating fully in Richmond's construction contracting industry. I find deep irony in second-guessing Richmond's judgment on this point. As much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination. ...

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More fundamentally, today's decision marks a deliberate and giant step backward in this Court's affirmative action jurisprudence. Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general. The majority's unnecessary pronouncements will inevitably discourage or prevent governmental entities, particularly States and localities, from acting to rectify the scourge of past discrimination. This is the harsh reality of the majority's decision, but it is not the Constitution's command.

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...My view has long been that race-conscious classifications designed to further remedial goals "must serve important governmental objectives and must be substantially related to achievement of those objectives" in order to withstand constitutional scrutiny.

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Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures. ... This is an unwelcome development. A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism. ...

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In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brute and repugnant forms of state-sponsored racism, a majority of the Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity.

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...Our cases in the areas of school desegregation, voting rights, and affirmative action have demonstrated time and again that race is constitutionally germane, precisely because race remains dismayingly relevant in American life.

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The majority today sounds a full-scale retreat from the Court's longstanding solicitude to race-conscious remedial efforts "directed toward deliverance of the century-old promise of equality of economic opportunity." ...The new and restrictive tests it applies scuttle one city's effort to surmount its discriminatory past, and imperil those of dozens more localities. I, however, profoundly disagree with the cramped vision of the Equal Protection Clause which the majority offers today and with its application of that vision to Richmond, Virginia's, laudable set-aside plan. The battle against pernicious racial discrimination or its effects is nowhere near won. I must dissent.